In the

Supreme Court of the United States

October Term, 1978

No. 78-752

T. L. BAKER,

Petitioner,

v.

LINNIE CARL MCCOLLAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page

Cases

Statutes

Constitution

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The petitioner, T. L. Baker, prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals for the Fifth Circuit rendered in these proceedings on June 19, 1978.

OPINION BELOW

The opinion of the Court of Appeals is officially recorded in volume 575 F. 2d 509 (1978) and is set forth in the appendix to this petition pp. A-1 - A-7 (hereinafter referred to as "App.").

JURISDICTION

The judgment of the Court below (App., *infra*, pp. A-1 - A-7) was entered on June 19, 1978. A timely petition for a rehearing was denied on August 10, 1978 (App., *infra*, p. A-8). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the simple negligence of Petitioner in failing to establish administrative procedures which might have earlier secured the release of Respondent supports a cause of action against the Sheriff under 42 U.S.C. § 1983 though Respondent was arrested and confined in good faith reliance on a valid warrant in the name of Respondent.

2. Whether, as a matter of law, the Sheriff should be entitled to qualified immunity from claims made under 42 U.S.C. § 1983 when the good faith of the Sheriff is conceded and the reasonableness of the arrest and confinement was supported by a validly issued warrant in the name of Respondent.

3. Whether an official "causes" an unlawful confinement merely because he has failed to act to discover the mistakes of others which were the cause, in fact, of the unlawful confinement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitution of the United States:

Section 1 of the Fourteenth Amendment to the Constitution provides in pertinent part:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. United States Code:

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE[1]

Petitioner T. L. Baker became Sheriff of Potter County on November 20, 1972 (Tr. 31) following the death of his predecessor (Tr. 82). At the time he became Sheriff, there was an outstanding warrant for the arrest of one "Linnie Carl McCollan" dated November 3, 1972 (P. Ex. 7). On December 26, 1972, the Potter County Sheriff's Department was notified that the said "Linnie Carl McCollan" was being held by the Dallas Police Department, and on December 30, 1972, a deputy was dispatched to return the prisoner on the warrant (Tr. 51, 52). Respondent was brought to the Potter County jail on December 30, 1972 and held there until released on January 2, 1973 (Tr. 54, 55).

Petitioner Baker was not keeping regular office hours during the holiday period of December 30, 1972 through January 1, 1973 (Tr. 95) but was in contact with the personnel at his office (Tr. 96). Upon being notified on January 2, 1973 that Respondent was claiming not to be the person sought by the warrant, Petitioner Baker investigated and determined that the warrant should have been issued for "Leonard McCollan" and ordered Respondent released (Tr. 97, 98).

[1] References to the Reporter's transcript of proceedings shall be indicated "Tr.", references to Plaintiff's exhibits as "P. Ex.", references to Defendant's exhibits as "D. Ex." and references to record documents filed with the Clerk as "R.".

Petitioner Baker learned at the time of releasing Respondent that a person was previously arrested as "Linnie Carl McCollan" but was, in fact Leonard McCollan, a brother of Respondent (Tr. 90, 91, 195, 196). Leonard McCollan had, at the time of his arrest, exhibited a driver's license describing Respondent and with Respondent's name and driver's license number thereon (Tr. 89-91). The date of birth and other description taken from the driver's license exhibited by Leonard McCollan was used to identify Respondent at the time of his arrest and was identical to the information contained on Respondent's then current driver's license (Tr. 189, 190, 241; D. Ex. 13, Tr. 147, 148; 192, 193).

Petitioner Baker's first actual knowledge that Respondent claimed not to be the person sought came on January 2, 1973, six days after the arrest and three days after his transfer to Potter County. Upon learning that Respondent claimed that the warrant should have been for his brother, Petitioner Baker investigated and acted immediately to secure the release of Respondent (Tr. 90, 91, 97, 98, 195, 196). Following the incident, Respondent Baker inaugerated a policy requiring deputies picking up prisoners in other jurisdictions to take with them available mug shots and fingerprint records (Tr. 68, 69). At the time of the arrest of Respondent such a policy either did not exist or was not being followed (Tr. 68, 69).

Respondent filed a complaint in the United States District Court for the Northern District of Texas seeking to recover under 42 U.S.C. § 1983 for false arrest and false imprisonment against the arresting police officer, the Dallas Chief of Police, Sheriff T. L. Baker and his surety Transamerica Insurance Company (R. 63). Prior to trial the arresting officer and the Dallas Chief of Police were dismissed from the suit (R. 87). After full trial on the merits, the trial court granted Petitioner's motion for directed ver-

dict and dismissed Petitioner and Transamerica Insurance Company from the case (R. 87). The Court of Appeals reversed and remanded for a new trial (App. pp. A-1 - A-7). A petition for rehearing was denied (App. p. 8).

REASONS FOR GRANTING THE WRIT

I.

THE COURT BELOW HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A MANNER IN A DIRECT CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS AND NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

A. *Does simple negligence alone support a § 1983 cause of action?*

In the instant case, the arrest and confinement of Respondent was unquestionably in good faith reliance on a valid warrant. The warrant which served as the authority for arresting and holding Respondent was regular on its face and in the name of Respondent.[2] The Court below found that Petitioner's "subjective good faith" was not questioned[3] and that the Petitioner played no part in having the warrant issued in the wrong name.[4]

The Court below treated the warrant as conferring no authority for the arrest and confinement of Respondent and found a *prima facie* case to have been stated because it had been determined that Respondent was not the person who should have been named in the warrant. The holding of the Court below that there was a cause of action under § 1983

[2] The face of the warrant introduced as Plaintiff's Exhibit 7 is reproduced in the appendix, App. A-9.

[3] Opinion below, App. A-5.

[4] Opinion below, footnote 4, App. A-5.

was predicated upon no more than Petitioner's simple negligence in executing the warrant. Consistent with this the court below said:

> "The only real question in this case is whether the Sheriff's failure to introduce a policy of sending photographs and finger prints or his failure to have someone on duty to check Plaintiff's identity upon his arrival or during his stay at Potter County jail was unreasonable." (App. A-5).

In requiring a remand to answer the question posed, the Court necessarily found that simple negligence in administration by a public official did state a cause of action under 42 U.S.C. §1983.[5] In so holding, the opinion is in direct conflict with the holding of the 10th Circuit in *Atkins v. Lanning*, 556 F. 2d (10th Cir. 1977) and the pronouncements of this Court concerning the limitations to be placed upon 42 U.S.C. § 1983 as stated in *Paul v. Davis*, 424 U.S. 693, 96 S. Ct 1155, 47 L. Ed 2d 405 (1976).

The Court in *Atkins v. Lanning*, 556 F. 2d 485 (10th Cir. 1977) had before it a fact situation virtually indentical to that reviewed below. A warrant was mistakenly issued for "Timothy Adkins" and based thereon one Timothy Dale Atkins was arrested[6] and confined for some thirty-three (33) days before the mistake was discovered. The Court examined the conduct of the individuals whose

[5] The Court below did not even limit actionability under § 1983 to simple negligence. In fact, the Court held that since the person arrested was not the person actually wanted for the crime the arrest was unlawful and, that this stated a cause of action as a matter of law. Opinion below, App. A-4.

[6] The person actually sought was Edward Adkins, the warrant was issued for Timothy Adkins and the person arrested was Timothy Atkins. *Atkins v. Lanning*, 556 F. 2d 485, 487 (10th Cir. 1977.

negligence caused the mistake[7] and found that mere negligence in handling administrative duties would not support a cause of action under 42 U.S.C. § 1983. The *Atkins* Court said:

> "Simply because under state common law the slightest interference with personal liberty might constitute a false imprisonment, it does not follow that all such invasions, however trivial or frivolous, serve to activate remedies under the due process clause of the Fourteenth Amendment. . . ." *Id.* at 489.

In rejecting the negligence theory, the Court relied upon *Paul v. Davis, supra*, where this Court indicated that the Fourteenth Amendment was not ". . . a font of tort law to be superimposed upon whatever systems may already be administered by the state." 424 U.S. at 701.

Other Circuits have also examined the question of whether simple negligence may serve as the basis for a Section 1983 case.[8] In *Bonner v. Coughlin*, 543 F. 2d 565 (7th Cir. 1976) the Court reviewed the history of 42 U.S.C. § 1983 and concluded:

> ". . . [E]xtending Section 1983 to cases of simple negligence would not deter future inadvertance as much as in the case of intentional reckless conduct. Consequently, the majority of Circuits hold that mere negligence does not state a claim under Section 1983. Otherwise the Federal Courts would be inundated with State tort cases in the absence of Congressional intent to widen Federal jurisdiction so drastically." *Id.* at 568.

[7] The conduct in question here was the negligence of investigators who "caused" the erroneous warrant to be issued. Id. at 489. Below, the Court found causation when it concluded that Petitioner's ". . . failure to require his deputies to transmit the identifying material described above [mug shots and fingerprints] 'caused' Plaintiff's continued detention." Opinion below App. A-5.

[8] See, e.g., *Gittlemaker v. Prasse*, 428 F. 2d 1 (3rd Cir. 1970); *Church v. Hegstron*, 416 F. 2d 449 (2d Cir. 1969).

If the opinion below is allowed to stand, the Fourteenth Amendment will have become a pervasive Federal tort law, a possibility rejected by this Court in *Paul v. Davis, supra.*

B. *Does simple negligence in handling administrative procedures destroy the qualified immunity afforded public officials?*

In this case the Court below is holding that the arrest and confinement of an individual in good faith and pursuant to a warrant valid on its face is not alone sufficient to show reasonableness as a matter of law; standing alone such a showing merely poses a fact question to a jury as to the reasonableness of the arrest. This precept transcends the standard of care heretofore imposed by this court and other Circuit courts upon law enforcement officers as a requisite for avoiding liability under § 1983.

This court has on several occasions articulated lines of demarcation delimiting the § 1983 liability of law enforcement officials and other individuals for false arrest and false imprisonment, eg. *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1957); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *Wood v. Strickland*, 430 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975). In a trenchant statement of the rationale for immunity, i.e., the public policy served thereby, Justice Burger noted in *Scheuer v. Rhodes, supra,* that

> Implicit in the idea that officials have some immunity — absolute or qualified — for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all. 416 U.S. at 242.

If the concept of qualified immunity is to have any meaning, then there must be some area within which an official may

exercise discretion without risking a damage action against him. By holding, in essence, that acts done in good faith and in reliance upon process seemingly valid are legally insufficient to insulate an officer any time there is the slightest evidence of negligence, the Court below has rendered the precept of qualified immunity inoperative.

In *Atkins v. Lannning, supra,* the Court applied the qualified immunity doctrine to exonerate the arresting officer. In holding that the good faith belief that his behavior was proper was sufficient where the officer was relying on a warrant regular on its face, the Court necessarily found that the warrant fulfilled the "objective reasonableness" requirement as a matter of law. Thus the Court did not consider it necessary or proper to go behind the warrant even though it was clear that the person arrested was not the person sought and there was even a difference in spelling of the name on the warrant and the name used by the person arrested.[9]

In the instant case, the warrant was in Respondent's name and Respondent was identified as the man wanted by means extraneous to the warrant. Nevertheless, the Court below treats the requirement of objective reasonableness as requiring a fact issue where there is any evidence of negligence. Such conclusion would appear to be in direct conflict with the concept of immunity stated in *Scheuer v. Rhodes supra,* which assumes that officials will err.

C. *Does an official "cause" an unlawful confinement merely because he has failed to act to discover the mistakes of others which were the cause, in fact, of the unlawful confinement?*

The Court below held that Respondent was unlawfully confined as a matter of law. Since the warrant should

[9] Id. at 47.

have been issued for Leonard McCollan the Court treated it as no authority for arresting Respondent notwithstanding that it named Respondent and other evidence tied him to the warrant. Even then, the Court below, in order to find evidence of a cause of action against Petitioner under § 1983, had to strain to find the requisite casual relationship between an act of Petitioner and the deprivation suffered by Respondent. The Court resolved their dilemma by holding:

> "Sheriff Baker's failure to require his deputies to transmit the identifying material described above [fingerprints and mug shots] 'caused' Plaintiff's continued detention."

The Court reached this conclusion by extending a prior holding in *Bryan v. Jones*, 530 F. 2d 1210 (5th Cir. en banc) cert. denied 429 U.S. 865 (1976) where the Court had held the Sheriff would be liable "[i]f he negligently establishes a record keeping system in which errors of this kind are likely. . . ." While the cases are very close, at least in *Bryan* the facts allowed the Court to characterize the questionable conduct as active negligence. Further, in that case there was absolutely no discretion insofar as the acts to be taken because the charges against the prisoner had been dismissed and an order communicated directing his release.

Here, the cause was misidentification which should allow for some discretion in conduct. Furthermore, the mistake that Petitioner failed to catch was one made by others. The causes, in fact, of the arrest of Respondent included the adoption of Respondent's identity by his brother Leonard, the use by Respondent's brother of a driver's license identical to that of Respondent except for the photograph, the failure of deputies working under Petitioner's predecessor to discover the use of an alias by Leonard, the existence

of two licenses with the same number and the same descriptive information contained thereon but with two different photographs, and ultimately the issuance of a warrant in the name of Linnie Carl McCollan.

In using the "but for" standard of causation to relate the Sheriff's act of omission to the confinement of Respondent one must question the lower Court's decision in other cases. In *Anderson v. Nosser*, 438 F. 2d 183 (5th Cir. 1971) modified and affirmed 456 F. 2d 835 (1972) cert. denied 409 U.S. 848, the Court reviewed, *inter alia*, the failure of officials to take prisoners before a magistrate in conformance with Mississippi law. Following a line of its own cases, the Fifth Circuit held that such failure, though it stated a false imprisonment claim under State law, did not state a cause of action under § 1983. Yet, "but for" the failure to take the prisoners before a magistrate, it could be easily argued that the confinement would have ended sooner.

The foregoing may simply be another way of raising the issue of whether simple negligence states a cause of action. Yet it does appear to be a valid basis for this Court granting certiorari. Section 1983 provides a cause of action only when "acting under color of law" a person "subjects, or causes to be subjected" a citizen "to the deprivation of any rights, privileges or immunities secured by the Constitution. . . ."

Possibly the explanation for the seeming dilemma posed above is the mischaracterization of Petitioner's conduct below. Clearly, if Petitioner caused Respondent to be confined and the confinement was unlawful, a cause of action would be stated under *Bryan v. Jones, supra.* Petitioner's act of omission, however, was the failure to institute a particular method of identification. In finding a cause of action, the Court below is, in effect, holding that due pro-

cess requires that a person to be arrested be identified by mug shots and fingerprints when available. Thus characterized, one finds a conflict here between the opinion below and this Court's recent holding in *Procunier v. Navarette*, ... U.S., ... 55 L. Ed. 24, 98 S. Ct. ..... (1978). There, this Court held that immunity existed as a matter of law where there was good faith and the deprivation was of a right not clearly recognized at the time as a constitutional right. No case has ever held that due process requires a specified manner of identifying a person to be arrested. Thus, Petitioner Baker's act of omission did not deprive Respondent of a recognized Federal right.[10]

II.

THE COURT BELOW HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE PREVIOUSLY REVIEWED BY THIS COURT BUT NOT DECIDED BY THIS COURT.

In *Procunier v. Navarette, supra,* this court granted Certiorari to consider whether simple negligent conduct which interferes with a constitutional right gives rise to a claim under § 1983. The court below recognized that this question was the same as that raised in *Procunier* and withheld its opinion until this court ruled. This court decided *Procunier* on other grounds and left unanswered the issue raised herein.

In dissenting because the court did not decide the *Procunier* case on the grounds urged now, Chief Justice

[10] Where dealing with an area calling for discretion, this Court said in *Wood v. Strickland*, 420 U.S. 308, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975):

> ". . . § 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of specific institutional guarantees." 420 U.S. 326.

Burger proposed a rule of law which appears to conflict with the decision below. Justice Burger said:

> "I would hold that one who does not intend to cause and does not exhibit deliberate indifference to the risk of causing harm that gives rise to a constitutional claim is not liable for damages under § 1983." 55 L. Ed. 2d at 34.

Regardless of whether Justice Burger's position is ultimately adopted, review is essential because of the demonstrated conflicts developing in the Circuit Courts.

This case presents an excellent fact situation for determining the issue because there is no question regarding the good faith of Petitioner Baker. His only overt act in relation to Respondent was to secure Respondent's release. There was no evidence of intentional harm nor of deliberate indifference to harm caused. The sole basis for liability found by the Court below is the unintentional and possibly negligent failure to have instituted an administrative policy which *might* have earlier secured the release of Respondent.

If allowed to stand, the decision of the court below suggests two questionable rules of law: (1) that an act of omission amounting to no more than simple negligence states § 1983 claim; and (2) that the notion of qualified immunity from § 1983 liability inherently requires a jury determination of the reasonableness of the conduct in question.

The holding effectively creates a federally-protected constitutional right to be free from any negligence attributable to law enforcement officers and other officials by casting Section 1983 as an intrusive, all-inclusive federal tort statute, and emasculates the qualified immunity enjoyed by designated officials under the prior holdings of this Court.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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LINNIE CARL MCCOLLAN,
Plaintiff-Appellant,

v.

G. R. TATE ET AL.,
Defendants,

T. L. BAKER AND TRANSAMERICA
INSURANCE COMPANY,
Defendants-Appellees.

No. 76-1268.

United States Court of Appeals,
Fifth Circuit.

June 19, 1978.

Appeal from the United States District Court for the Northern District of Texas.

Before WISDOM and GEE, Circuit Judges, and VAN PELT,* District Judge.

GEE, Circuit Judge:

Plaintiff's name is Linnie McCollan. His brother, whose real name is Leonard McCollan, somehow procured a duplicate of plaintiff's driver's license, identical to plaintiff's except that Leonard's picture graced it instead of Linnie's. Leonard was arrested on a narcotics charge and since he was carrying the doctored driver's license, he was booked under the name of Linnie C. McCollan.

Leonard was released on bond. His bondsman received an order allowing him to surrender his principal and a warrant issued for the arrest of Leonard. Since Leonard had been using his brother's name, the warrant was in the name of

* Senior District Judge of the District of Nebraska, sitting by designation.

Linnie C. McCollan. Linnie (the real Linnie) was arrested on the warrant in Dallas County on December 26, 1972. He was kept in a Dallas jail until December 30, when deputies from Potter County, where the warrant had issued, took custody of him. He was kept in the Potter County Jail until January 2, 1973, when the error was noticed and he was released.

Linnie subsequently brought this action in federal court claiming violation of his rights under the fourteenth amendment and section 1983. The trial judge directed a verdict for Potter County Sheriff T. L. Baker and his surety, defendant Transamerica Insurance Company. Plaintiff's claims against all other defendants were dismissed with prejudice. Only the directed verdict as to Baker and Transamerica is before this court on appeal. Having originally postponed decision in this case pending the Supreme Court's disposition of *Procunier v. Navarette*, —— U.S. ——, 98 S.Ct. 885, 55 L. Ed. 2d 24 (1978),[1] we now hold that plaintiff's case should have been presented to the jury and, accordingly, we reverse and remand for a new trial.

The facts as developed at trial are largely undisputed, and to the extent there is conflict we must view the evidence in the light most favorable to the nonmoving party, in this case the plaintiff. *See Boeing Co. v. Shipman*, 411 F. 2d 365 (5th Cir. 1969) (en banc). If the evidence, when viewed in this light, is so one-sided that reasonable minds could not reach a contrary verdict, the district court's directing the verdict in favor of the defendant was proper.

[1] *Procunier*, which had been argued but not decided at the time of oral argument in this case, presented, *inter alia*, the issue of whether simple negligence on the part of a state official could give rise to § 1983 liability. See *Procunier v. Navarette*, *U.S.* , , 98 S. Ct. 855, 862—63, 55 L. Ed. 2d 24 (Burger, C. J., dissenting). However, the Supreme Court disposed of the case on other grounds.

Ibid. If reasonable minds could reach contrary conclusions, the issue should have gone to the jury.

When the Dallas police notified the Potter County Sheriff's Department that they had arrested "Linnie C. McCollan," the identification of plaintiff as the man wanted under the warrant was verified by his birthdate as shown on his license. Unfortunately, the written information on both Linnie C. McCollan's and Leonard (alias Linnie C.) McCollan's driver's licenses was identical. So this verification failed to reveal the error. The Potter County Sheriff's Department did not send the mugshots and fingerprints of Leonard McCollan which it had in its files. Nor did the sheriff's deputies who drove to Dallas to pick up the plaintiff take this identifying material with them. When the deputies brought plaintiff to the Potter County Jail on December 30, no one was on duty in the Identification Department, and no one compared plaintiff with the photographs and fingerprints on file. Had the photographs and fingerprints been sent or carried to Dallas or had the identifying information in the file at the sheriff's office been checked, the mistake would have been evident. Although plaintiff is Leonard's brother, he does not resemble Leonard in appearance.

The leading case in the Fifth Circuit on a sheriff's liability for false imprisonment under section 1983 is *Bryan v. Jones*, 530 F. 2d 1210 (5th Cir.) (en banc), *cert. denied*, 429 U.S. 865, 97 S. Ct. 174, 50 L. Ed. 2d 145 (1976). The court, sitting en banc, held that a sheriff has the kind of qualified immunity which the Supreme Court has recognized in certain other public officials. *See Wood v. Strickland*, 420 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967). Under *Bryan* a sheriff is not liable under section 1983 if he acted in good faith and he acted reasonably. 530 F. 2d at 1215.

Bryan made clear that in a section 1983 false imprisonment action the reasonable good faith of the sheriff comes into play only as a defense. To make out a prima facie case, a plaintiff need show only: (1) intent to confine; (2) acts resulting in confinement; and (3) consciousness of the victim of confinement or resulting harm. 530 F. 2d at 1213, *citing* Restatement (2d) Torts § 35 (1965). There can be no doubt that the sheriff's deputies intended to confine and did confine the plaintiff. Similarly, there can be no doubt that plaintiff was aware of the fact that he was being held in jail. Since the deputies' actions were authorized by Sheriff Baker and the same actions were in keeping with the policies of the Potter County Sheriff's Department at that time, plaintiff established his prima facie case against Sheriff Baker. *See Jennings v. Patterson*, 460 F. 2d 1021 (5th Cir. 1972). *Cf. Rizzo v. Goode*, 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976) (supervisory officials not subject to injunction under section 1983 where no showing that they authorized or approved lower officials' misconduct). Assuming *arguendo* that the actions and intent of the deputies are not properly attributable to the sheriff,[2] on the facts of this case

[2] Prior § 1983/false imprisonment cases have not dealt squarely with the problem of whether a sheriff must have personal knowledge that a person is being held in his jail in order for him to be liable under § 1983. *See Bryan v. Jones, supra; Whirl v. Kern*, 407 F. 2d 781 (5th Cir.), cert. denied; 396 U.S. 901, 90 S. Ct. 210, 24 L. Ed. 2d 177 (1969). In *Whirl* the court discussed the absence of personal knowledge only with respect to the state-law false imprisonment issue, over which the court had pendent jurisdiction 407 F. 2d at 795. With respect to the federal false imprisonment claim under § 1983, *Whirl* held that a sheriff need not know that a prisoner's detention is *unlawful*. But the opinion says nothing about a sheriff's knowledge that the prisoner is being detained and § 1983 liability. *Bryan* answered the qualified immunity question but said nothing about the application of respondeat superior notions to plaintiff's prima facie case. *See also Lewis v. Hyland*, —U.S.—, 98 S. Ct. 419, 54 L. Ed. 2d 291 (1977) (Marshall, J., dissenting from denial of certiorari); Developments, 90 Harv. L. Rev. 1133, 1206-09 (1977).

plaintiff was entitled to go to the jury on the basis of Sheriff Baker's own action or inaction. To incur liability under section 1983 a state official need not directly subject a person to a deprivation of his constitutional rights. The language of the statute[3] and the holdings of this court make clear that he can be held liable if he causes the plaintiff to be subjected to a deprivation of his constitutional rights. *See Sims v. Adams*, 537 F. 2d 829 (5th Cir. 1976). Sheriff Baker's failure to require his deputies to transmit the identifying material described above "caused" plaintiff's continued detention. Plaintiff has made out a prima facie case under *Bryan*, and Sheriff Baker can escape liability only if he acted in reasonable good faith. As the court said in *Bryan*, "[i]f [the sheriff] negligently establishes a . . . system in which errors of this kind are likely, he will be held liable." 530 F. 2d at 1215.

The only real question in this case is whether the sheriff's failure to introduce a policy of sending photographs and fingerprints or his failure to have someone on duty to check plaintiff's identity upon his arrival or during his stay at Potter County Jail was unreasonable.[4] Since plaintiff in no way challenges the subjective good faith of the sheriff, his qualified immunity hangs on the reasonableness of his

[3] Section 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, *or causes to be subjected*, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

(Emphasis added).

[4] Since the sheriff did not take office unntil after the warrant had issued in the name of "Linnie C. McCollan," he cannot be held responsible for any conduct by the sheriff's department prior to that time.

action or inaction. The sheriff himself testified that it was a standard practice in most sheriff's departments the size of his to send such identifying material. Certainly the jury could have found that he behaved unreasonably in failing to institute a similar policy. Alternatively, the jury might have concluded that comparing the date of birth, as listed in the sheriff's files, with the date of birth on plaintiff's driver's license when he was arrested in Dallas was sufficient safeguard against arresting and detaining the wrong person and that it was reasonable for the sheriff not to require his deputies to take the additional precaution of sending the photographs and fingerprints.

Defendant contends that the existence of the warrant for the arrest of a person named Linnie C. McCollan created a duty in him to arrest and detain the plaintiff. He relies on *Perry V. Jones*, 506 F. 2d 778 (5th Cir. 1975), for the proposition that since plaintiff was arrested and detained on a warrant fair on its face, he has committed no wrong cognizable under section 1983.

Defendant misperceives his duties. His argument would find a duty in a police officer or sheriff to arrest any person who bears the name in which a warrant was issued. A warrant for John Smith would put a policeman under a duty to arrest the first John Smith, or perhaps all John Smiths, he encountered. Such cannot be the law.

We are not saying that a sheriff is under a duty to make an independent investigation as to the guilt or innocence of a person wanted under a warrant. If a warrant was issued for the arrest of an individual and the individual *actually* wanted under that warrant is arrested, the arresting officer has fulfilled his duty, and he will not be liable for false arrest or false imprisonment merely because the person arrested is later found to be innocent of the charges

against him. *Perry v. Jones, supra.* We are saying that the sheriff or arresting officer has a duty to exercise due diligence in making sure that the person arrested and detained is actually the person sought under the warrant and not merely someone of the same or a similar name. *See* Restatement (2d) Torts § 125, comment (d) 1965).

REVERSED AND REMANDED.

IN T . UNITED STATES COURT OF A ALS
FOR THE FIFTH CIRCUIT

. COURT OF APPE.
FILED
AUG 10 1978
OWARD W. WADSWORTH
CLER

NO. 76-1268

LINNIE CARL McCOLLAN,

Plaintiff-Appellant,

versus

G. R. TATE, ET AL.,

Defendants,

T. L. BAKER and TRANSAMERICA INSURANCE COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(August 10, 1978)

Before WISDOM and GEE, Circuit Judges, and VAN PELT*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

*Senior District Judge of the District of Nebraska, sitting by designation.

WARRANT OF ARREST OR CAPIAS

RECEIVED at 2:00 o'clock P M
NOV 3 1972
POTTER COUNTY, TEXAS
SHERIFF'S OFFICE
BY _____ DEPUTY

THE STATE OF TEXAS

To the Sheriff or Any Constable of Potter County, Said State—GREETINGS:

You are Commanded to take the body of LINNIE CARL McCOLLAN

and bring him before me at my office in Amarillo, in said County, on the instanter, then and there to answer the STATE OF TEXAS, for an offense against the laws of said state, to-wit: SALE OF NARCOTICS

AFFIDAVIT FILED BY JOHNNIE CARTER TO BE RELEASED AS SURETY ON BOND

of which offense he is accused by the written Complaint under oath of JOHNNIE CARTER

filed before me.

HEREIN FAIL NOT but have you then and there, before me, this writ with your return endorsed thereon, showing how you have executed the same.

Witness my signature on this, the 3rd day of November 1972.

Justice of Peace, Precinct No. One, Potter County, Texas
C. L. Roberts

PLAINTIFF'S EXHIBIT 7

APPENDIX

In the Supreme Court of the United States

October Term, 1978

No. 78-752

T. L. BAKER

v.

LINNIE CARL McCOLLAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 6, 1978
CERTIORARI GRANTED JANUARY 15, 1979

INDEX

RELEVANT DOCKET ENTRIES

August 23, 1974—Filed COMPLAINT and issued SUMMONS (2)

September 17, 1974—Filed Defendant's (T. L. Baker) ORIGINAL ANSWER with Jury Demand

December 19, 1974—Filed FIRST AMENDED COMPLAINT adding Transamerica Insurance Co. as deft

January 13, 1975—Filed DEFENDANTS' (Transamerica Ins. Co's) ORIGINAL ANSWER with Jury Demand

May 7, 1975—Filed FIRST AMENDED ANSWER of Defendant, T. L. Baker

June 6, 1975—Filed SECOND AMENDED COMPLAINT

November 12, 1975—Filed Deft's (Baker) (second) MOTION for Directed Verdict (granted in open court) WMTJr

November 12, 1975—Filed DIRECTED VENDICT for defendants (Baker and Transamerica)

November 26, 1975—Filed JUDGMENT on directed verdict for defendants, T. L. Baker and Transamerica Ins. Co. . . . on pltf's motion, non-suit as to defts G. R. Tate and Frank Dyson and they are dismissed with prejudice and that said defts recover their costs . . . pltf take nothing as to defts Baker and Transamerica and that defts recover their costs WMTJr

December 5, 1975—Filed Pltf's NOTICE OF APPEAL from Judgment filed on 11-26-75. Copy of Notice & docket sheet mailed to Court of appeals. Atty notified other counsel.

In the

United States District Court
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA3-74-823C

LINNIE CARL MCCOLLAN,

Plaintiff,

v.

G. R. TATE, T. L. BAKER, JOHN DOE and TRANSAMERICA INSURANCE COMPANY,

Defendants.

FIRST AMENDED ANSWER OF DEFENDANT, T. L. BAKER

Now comes T. L. BAKER, one of the Defendants in the above styled and numbered cause, and in response to the First Amended Complaint of Plaintiff herein, answers and shows the Court the following:

1. Defendant admits that Plaintiff has asserted various Federal statutory and Constitutional bases for bringing this suit as alleged in Paragraph 1 of Plaintiff's First Amended Complaint but denies that Plaintiff has alleged facts giving this Court jurisdiction of this matter.

2. Defendant does not have information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of Plaintiff's First Amended Complaint.

3. In response to paragraph 3 of Plaintiff's First Amended Complaint, Defendant Baker admits that he is a resident of Potter County, Texas, and that he is the duly elected Sheriff in and for such county. Defendant further admits that he is generally responsible for the

Potter County jail under Article 5116, V.A.T.S., but denies that he is responsible for all actions of his deputies as alleged. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 3.

4. Defendant admits that Plaintiff was brought to the Potter County jail by deputies of the Potter County Sheriff's office on or about December 30, 1972 but denies that he remained there until January 3, 1973 but would show the Court that he was released on January 2, 1973. Defendant further denies that said Plaintiff was arrested and incarcerated without probable cause and without authority of a warrant. Defendant admits that Plaintiff was released when it was determined that his identity had been confused with that of his brother, one Leonard C. McCollan. Defendant is without information sufficient to form a belief as to the truth of the allegations in Paragraph 4 of Plaintiff's First Amended Complaint with respect to allegations concerning his arrest and confinement by the City of Dallas. All other allegations of Paragraph 4 are denied.

5. Defendant Baker denies that Plaintiff was damaged as alleged in Paragraph 5 of Plaintiff's First Amended Complaint as a result of any actions by Defendant Baker or for which he might be responsible and further denies that Plaintiff suffered any damages as alleged in such paragraph.

6. Defendant denies that Plaintiff is entitled to recover any damages from Transamerica Insurance Company as a result of any actions of this Defendant as alleged in paragraph 6.

7. Defendant denies that there was any gross negligence or reckless disregard for the rights of Plaintiff giving rise to exemplary damages as alleged in paragraph 7 of Plaintiff's First Amended Complaint and would show the Court that this Defendant at all times acted with due regard for said Plaintiff's rights.

FIRST DEFENSE

The Complaint fails to state a claim against this Defendant upon which relief can be granted.

SECOND DEFENSE

The Complaint does not allege facts sufficient to show that it is one arising under the Constitution or laws of the United States.

THIRD DEFENSE

The Complaint fails to invoke the jurisdiction of this Court.

FOURTH DEFENSE

Defendant Baker acted in good faith in all actions taken by him and in carrying out his duties of Sheriff with respect to Plaintiff and in so doing is not liable to said Plaintiff as alleged in Plaintiff's Complaint.

FIFTH DEFENSE

Defendant Baker and all persons acting for or under him acted in good faith in arresting and confining Plaintiff and taking any action alleged by Plaintiff to have violated his rights.

SIXTH DEFENSE

Defendant Baker is not responsible under the doctrine of "respondeat superior" for the actions of his deputies and is not liable for any conduct of his deputies as alleged by Plaintiff herein.

SEVENTH DEFENSE

Defendant Baker and all persons acting for or under him had probable cause for arresting and confining Plaintiff.

EIGHTH DEFENSE

Plaintiff was, at all times, afforded due process of law under the Constitution and Statutes of the United States in his arrest and confinement and any actions or failures to act by Defendant Baker or persons acting for or under him were not such actions as will breach any right or rights afforded Plantiff under the Fourteenth Amendment to the United States Constitution or Title 42 U. S. C. 1983.

NINTH DEFENSE

Plaintiff participated in creating the circumstance leading to his arrest by allowing his brother to obtain a duplicated driver's license with information thereon describing Plaintiff and Plaintiff should therefore not be allowed to recover where he created or helped to create the situation leading to his arrest and confinement.

TENTH DEFENSE

Plaintiff knew or should have known that his brother was using Plaintiff's name and identifying himself as Plaintiff and should have taken action to inform authorities of the confusion of identities. Plaintiff's failure to take such action contributed to the situation leading to his arrest and confinement and should bar Plaintiff from recovery for damages to which his own failures contributed.

ELEVENTH DEFENSE

Defendant Baker was acting at all times in the arrest and confinement of Plaintiff pursuant to a validly issued warrant for the arrest of a person named and identified as Plaintiff and immediately released said Plaintiff upon learning that he was not the person for whim the warrant was intended.

WHEREFOR, Defendant, T. L. BAKER, prays that Plaintiff take nothing by his suit and that Plaintiff's suit be in all things dismissed and that the Defendant recover from Plaintiff his costs in this behalf expended.

Respectfully submitted,

KERRY KNORPP, COUNTY ATTORNEY
SAMUEL C. KISER, ASSISTANT
COUNTY ATTORNEY
303 Courthouse
Amarillo, Texas 79101

A. W. SORELLE III
UNDERWOOD, WILSON, SUTTON,
BERRY, STEIN AND JOHNSON
P. O. Box 9158
Amarillo, Texas 79105

ATTORNEY FOR T. L. BAKER
ONE OF DEFENDANTS

By .....
One of Counsel

(CERTIFICATE OF SERVICE OMITTED)

In the

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CIVIL ACTION NO. 3-74-823-C

LINNIE CARL McCOLLAN,

Plaintiff,

v.

G. R. TATE, T. L. BAKER, FRANK DYSON and TRANSAMERICA INSURANCE COMPANY,

Defendants.

SECOND AMENDED COMPLAINT

NOW COMES LINNIE CARL McCOLLAN, hereinafter sometimes referred to as plaintiff and for cause of action would show as follows:

1. This action is brought pursuant to the Fourteenth Amendment to the United States Constitution and Title 28 U.S.C. 1343(3) (4) and Title 42 U.S.C. 1983, 1988.

2. The plaintiff is at all relevant times herein a resident of Dallas County, Texas.

3. Defendant, G. R. Tate, is a resident of Dallas County, Texas, and is a police officer for the City of Dallas, holding Badge #2835. Defendant, T. L. Baker, is a resident of Potter County, Texas and is the duly elected and qualified sheriff in and for such county. Article 5116, V.A.T.S., places the responsibility for the county jail directly upon the sheriff and defendant herein, T. L. Baker, and responsibility cannot be delegated to others. Texas law also makes defendant Baker responsible for the actions of his deputies. Defendant, Frank Dyson, is a resident of Dallas County, Texas, and is at all relevant times herein the Chief of Police for the City of Dallas, Texas; and the City of Dallas Ordinances and the City of Dallas Charter make him the keeper of the jail operated by the City of Dallas Police Department. Defendant, Transamerica Insurance Company, is a corporation organized and existing under and by virtue of the laws of the State of California and maintains its principal place of business in Los Angeles, California, and is duly authorized to do business in the State of Texas and is subject to process. It maintains an office in Dallas, Dallas County, Texas, and its registered agent for service is J. D. Foster. Process may be served upon Mr. Foster at 4230 LBJ Freeway, Dallas, Texas.

At all times material hereto defendants Tate, Baker and Dyson were acting under color of their official capacity and their acts were performed under color of the statutes of the State of Texas and/or the ordinances of the City of Dallas, and defendant, Transamerica Insurance Company, was at all times material hereto the surety for defendant, Baker.

4. On December 26, 1972, while your plaintiff was driving a car for his employer, Mail Messenger Service, he was stopped and accused by defendant City of Dallas Police Officer, G. R. Tate, of running a red traffic light at the intersection of Second and Scyene in the City of Dallas, Texas. Defendant Tate then issued your plaintiff

a traffic citation to appear on January 17, 1973, in Dallas Corporation Court No. 4 at 8:00 A.M. After plaintiff signed the traffic citation and promised to appear in court as directed, defendant Tate placed handcuffs on your plaintiff and put him in his police vehicle and transported plaintiff to a jail under the supervision of defendant, Frank Dyson. Your plaintiff was incarcerated without probable cause and without the authority of a warrant authorizing the arrest of your plaintiff. *On December 30, 1972, your plaintiff was taken in handcuffs and in chains by deputies of defendant, T. L. Baker, to the Potter County Jail.* Your plaintiff was then incarcerated in the Potter County Jail and remained there until January 3, 1973, when he was released and told that he was mistakenly arrested and incarcerated because a person lawfully charged with the sale of narcotics had given your plaintiff's name as his own. Throughout the entire illegal incarceration and illegal arrest and imprisonment of your plaintiff he was never

(1) brought before a judge or magistrate and/or

(2) advised of his right to counsel and/or

(3) permitted to telephone his wife or family and/or

(4) telephone or consult with a lawyer.

Each of the defendants separately and in concert acted outside the scope of his jurisdiction and without authorization of law acted wilfully, knowingly and negligently to deprive the plaintiff of his right to:

(1) Freedom from illegal seizure of his person;

(2) Freedom from unlawful arrest and imprisonment;

(3) Freedom from illegal detention and imprisonment;

(4) Freedom from physical intimidation.

Several times during the illegal arrest and imprisonment of your plaintiff by the defendants herein he insisted that there was some mistake and that he had done nothing which would authorize his imprisonment. All of these protests were ignored. At no time during his imprisonment, with the exception of the last hours of his imprisonment was any attempt made to match your plaintiff's physical description, finger prints or photograph with the actual perpetrator of the crime for which your plaintiff was falsely and illegally arrested and imprisoned.

5. As a direct and proximate cause of the aforesaid acts of each of the defendants herein your plaintiff suffered bodily pain and injury and mental anguish from being imprisoned in small, crowded, dirty, vermin infested jail cells and your plaintiff and his family was deprived of his income and support and the plaintiff was denied the right to comfort and aid his wife and child due to his incarceration. All of these damages amount to a sum not less than $50,000.00.

6. Your plaintiff is entitled to recover damages from defendant, Transamerica Insurance Company, due to the fact that it is the surety of defendant Baker and Texas law provides that the surety of a sheriff is responsible in damages jointly and severally with the sheriff.

7. Due to the gross negligence and reckless disregard of the defendants herein in not immediately ascertaining that they had falsely and illegally imprisoned your plaintiff, he becomes entitled to exemplary damages in a sum of $50,000.00.

WHEREFORE, plaintiff demands judgment against the defendants, each of them, jointly and severally, in the amount of $50,000.00, and he further demands punitive damages against defendants, and each of them, jointly and severally,

in the amount of $50,000.00, plus the costs of this action; and he further demands such other relief as to this Court seems just, proper and equitable.

Respectfully submitted,

Douglas R. Larson
800 Main Street
Dallas, Texas 75202
(214) 741-2958

Attorney for Plaintiff

CERTIFICATE OF SERVICE OMITTED

In the

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CIVIL ACTION NO. 3-74-823-C

LINNIE CARL MCCOLLAN,
Plaintiff,

vs.

G. R. TATE, T. L. BAKER, FRANK DYSON and TRANSAMERICA INSURANCE COMPANY,
Defendants.

MOTION FOR DIRECTED VERDICT

COMES Now Defendant, T. L. Baker, and after Plaintiff and Defendant rested and moves the Court to grant a directed verdict in favor of said Defendant, dismissing Plaintiff's cause herein and for grounds would show the following:

I.

Plaintiff has failed to plead a cause of action against Defendant, T. L. Baker, there being no allegations of any personal acts of said Defendant nor any facts causing him to be liable for the acts of others.

II.

The evidence presented by Plaintiff raises no fact issues which, if found favorable to Plaintiff, would support a verdict against Defendant, T. L. Baker.

III.

Plaintiff failed to produce any evidence tending to show that he was denied any rights cognizable under 42 U.S.C. § 1983, there being no evidence that anyone knowingly deprived him of any right without due process of law.

IV.

Defendant, T. L. Baker, is not liable, as a matter of law, for arrest and confinement pursuant to a warrant for arrest which is valid on its face.

V.

Plaintiff failed to show that Defendant Baker acted in any manner other than in the good faith belief that he was executing a valid warrant for arrest issued pursuant to proper authority.

VI.

There is no deprivation of a right giving rise to an action under 41 U.S.C. § 1983, as a matter of law, by failing to take Plaintiff before a magistrate or failing to warn Plaintiff of his rights as alleged by Plaintiff.

VII.

The evidence with respect to Defendant Baker shows only that he acted to secure Plaintiff his freedom and raises no

issue concerning any action by Defendant Baker to improperly deprive Plaintiff of his freedom.

VIII.

Defendant Baker is not responsible, as a matter of law, for the acts of his subordinates under the doctrine of "respondeat superior" and Plaintiff has failed to produce any evidence to indicate that Defendant authorized, participated, or in any way ratified any acts of his subordinates which violated any rights of Plaintiff.

IX.

Plaintiff has failed to show any physical intimidation as a violation of the Civil Rights Act alleged by Plaintiff in his complaint.

X.

Plaintiff has failed to show that he was refused permission to telephone or consult with his wife, family, or an attorney and such failures, if shown, could not be attributed to Defendant Baker.

XI.

An arrest and confinement pursuant to a warrant for arrest valid on its face does not create any cause of action under 42 U.S.C. § 1983.

XII.

Plaintiff failed to produce any evidence that Defendant Baker had any knowledge that the warrant for arrest pursuant to which Plaintiff was arrested, had been issued for the wrong person.

WHEREFORE, Defendant Baker moves the Court to grant a directed verdict for each and all of the foregoing reasons.

Respectfully submitted,

KERRY KNORPP and SAMUEL C. KISER
Office of the County Attorney
Potter County Courthouse
Amarillo, TX 79105

A. W. SORELLE III
UNDERWOOD, WILSON, SUTTON, BERRY, STEIN & JOHNSON
P. O. Box 9158
Amarillo, TX 79105

Attorneys for Defendant,
T. L. BAKER

One of Counsel

In the

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CIVIL ACTION NO. CA3-74-8[illegible]3C

LINNIE CARL MCCOLLAN,

Plaintiff,

v.

G. R. TATE, T. L. BAKER, FRANK DYSON and TRANSAMERICA INSURANCE COMPANY,

Defendants.

JUDGMENT

This cause came for trial before the Court and a jury on the 10th day of November, 1975, and prior to receiving any evidence, Plaintiff moved to take a non-suit against Defendants, G. R. Tate and Frank Dyson, and to accept dismissal of this cause as to those Defendants with prejudice, therefore, it is hereby .

ORDERED, ADJUDGED and DECREED that Defendants, G. R. Tate and Frank Dyson are dismissed with prejudice and that said Defendants have and recover their cost of action from Plaintiff and have execution therefor; and

The issues having been duly tried as to remaining Defendants, T. L. Baker and Transamerica Insurance Company, and on the 12th day of November, 1975, after the close of evidence by both parties, the Court directed the jury on motion of Defendant, T. L. Baker, to render a verdict for Defendants, T. L. Baker and Transamerica Insurance Company, that Plaintiff take nothing by his action against said Defendants, and such verdict having been rendered by the jury, it is hereby,

ORDERED, ADJUDGED and DECREED that Plaintiff take nothing by its action against Defendants, T. L. Baker and Transamerica Insurance Company, and that said Defendants have and recover their costs of action, and that Defendants have execution therefor.

DATED November 26, 1975.

W. M. Taylor, Jr.,
United States District Judge

LINNIE CARL MCCOLLAN,
Plaintiff-Appellant,

v.

G. R. TATE ET AL.,
Defendants,

T. L. BAKER AND TRANSAMERICA INSURANCE COMPANY,
Defendants-Appellees.

No. 76-1268.

United States Court of Appeals,
Fifth Circuit.
June 19, 1978.

Appeal from the United States District Court for the Northern District of Texas.

Before WISDOM and GEE, Circuit Judges, and VAN PELT,* District Judge.

GEE, Circuit Judge:

Plaintiff's name is Linnie McCollan. His brother, whose real name is Leonard McCollan, somehow procured a duplicate of plaintiff's driver's license, identical to plaintiff's except that Leonard's picture graced it instead of Linnie's. Leonard was arrested on a narcotics charge and since he was carrying the doctored driver's license, he was booked under the name of Linnie C. McCollan.

Leonard was released on bond. His bondsman received an order allowing him to surrender his principal and a warrant issued for the arrest of Leonard. Since Leonard had been using his brother's name, the warrant was in the name of Linnie C. McCollan. Linnie (the real Linnie) was arrested on the warrant in Dallas County on December 26, 1972.

* Senior District Judge of the District of Nebraska, sitting by designation.

He was kept in a Dallas jail until December 30, when deputies from Potter County, where the warrant had issued, took custody of him. He was kept in the Potter County Jail until January 2, 1973, when the error was noticed and he was released.

Linnie subsequently brought this action in federal court claiming violation of his rights under the Fourteenth Amendment and section 1983. The trial judge directed a verdict for Potter County Sheriff T. L. Baker and his surety, defendant Transamerica Insurance Company. Plaintiff's claims against all other defendants were dismissed with prejudice. Only the directed verdict as to Baker and Transamerica is before this court on appeal. Having originally postponed decision in this case pending the Supreme Court's disposition of *Procunier v. Navarette*, —— U.S. ——, 98 S.Ct. 885, 55 L. Ed. 2d 24 (1978),[1] we now hold that plaintiff's case should have been presented to the jury and, accordingly, we reverse and remand for a new trial.

The facts as developed at trial are largely undisputed, and to the extent there is conflict we must view the evidence in the light most favorable to the nonmoving party, in this case the plaintiff. *See Boeing Co. v. Shipman*, 411 F. 2d 365 (5th Cir. 1969) (en banc). If the evidence, when viewed in this light, is so one-sided that reasonable minds could not reach a contrary verdict, the district court's directing the verdict in favor of the defendant was proper. *Ibid.* If reasonable minds could reach contrary conclusions, the issue should have gone to the jury.

[1] *Procunier*, which had been argued but not decided at the time of oral argument in this case, presented, *inter alia*, the issue of whether simple negligence on the part of a state official could give rise to § 1983 liability. See *Procunier v. Navarette*, U.S. , , 98 S. Ct. 855, 862—63, 55 L. Ed. 2d 24 (Burger, C. J., dissenting). However, the Supreme Court disposed of the case on other grounds.

When the Dallas police notified the Potter County Sheriff's Department that they had arrested "Linnie C. McCollan,' the identification of plaintiff as the man wanted under the warrant was verified by his birthdate as shown on his license. Unfortunately, the written information on both Linnie C. McCollan's and Leonard (alias Linnie C.) McCollan's driver's licenses was identical. So this verification failed to reveal the error. The Potter County Sheriff's Department did not send the mugshots and fingerprints of Leonard McCollan which it had in its files. Nor did the sheriff's deputies who drove to Dallas to pick up the plaintiff take this identifying material with them. When the deputies brought plaintiff to the Potter County Jail on December 30, no one was on duty in the Identification Department, and no one compared plaintiff with the photographs and fingerprints on file. Had the photographs and fingerprints been sent or carried to Dallas or had the identifying information in the file at the sheriff's office been checked, the mistake would have been evident. Although plaintiff is Leonard's brother, he does not resemble Leonard in appearance.

The leading case in the Fifth Circuit on a sheriff's liability for false imprisonment under section 1983 is *Bryan v. Jones*, 530 F. 2d 1210 (5th Cir.) (en banc), *cert. denied*, 429 U.S. 865, 97 S. Ct. 174, 50 L. Ed. 2d 145 (1976). The court, sitting en banc, held that a sheriff has the kind of qualified immunity which the Supreme Court has recognized in certain other public officials. *See Wood v. Strickland*, 420 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967). Under *Bryan* a sheriff is not liable under section 1983 if he acted in good faith and he acted reasonably. 530 F. 2d at 1215.

Bryan made clear that in a section 1983 false imprisonment action the reasonable good faith of the sheriff comes into play only as a defense. To make out a prima facie case, a plaintiff need show only: (1) intent to confine; (2) acts resulting in confinement; and (3) consciousness of the victim of confinement or resulting harm. 530 F. 2d at 1213, *citing* Restatement (2d) Torts § 35 (1965). There can be no doubt that the sheriff's deputies intended to confine and did confine the plaintiff. Similarly, there can be no doubt that plaintiff was aware of the fact that he was being held in jail. Since the deputies' actions were authorized by Sheriff Baker and the same actions were in keeping with the policies of the Potter County Sheriff's Department at that time, plaintiff established his prima facie case against Sheriff Baker. *See Jennings v. Patterson*, 460 F. 2d 1021 (5th Cir. 1972). *Cf. Rizzo v. Goode*, 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976) (supervisory officials not subject to injunction under section 1983 where no showing that they authorized or approved lower officials' misconduct). Assuming *arguendo* that the actions and intent of the deputies are not properly attributable to the sheriff,[2] on the facts of this

[2] Prior § 1983/false imprisonment cases have not dealt squarely with the problem of whether a sheriff must have personal knowledge that a person is being held in his jail in order for him to be liable under § 1983. *See Bryan v. Jones, supra; Whirl v. Kern*, 407 F. 2d 781 (5th Cir.) cert. denied; 396 U.S. 901, 90 S. Ct. 210, 24 L. Ed. 2d 177 (1969). In *Whirl* the court discussed the absence of personal knowledge only with respect to the state-law false imprisonment issue, over which the court had pendent jurisdiction 407 F. 2d at 795. With respect to the federal false imprisonment claim under § 1938, *Whirl* held that a sheriff need not know that a prisoner's detention is *unlawful*. But the opinion says nothing about a sheriff's knowledge that the prisoner is being detained and § 1983 liability. *Bryan* answered the qualified immunity question but said nothing about the application of respondeat superior notions to plaintiff's prima facie case. *See also Lewis v. Hyland*, — U.S. —, 98 S. Ct. 419, 54 L. Ed. 2d 291 (1977) (Marshall, J., dissenting from denial of certiorari); Developments, 90 Harv. L. Rev. 1133, 1206-09 (1977).

case plaintiff was entitled to go to the jury on the basis of Sheriff Baker's own action or inaction. To incur liability under section 1983 a state official need not directly subject a person to a deprivation of his constitutional rights. The language of the statute[3] and the holdings of this court make clear that he can be held liable if he causes the plaintiff to be subjected to a deprivation of his constitutional rights. *See Sims v. Adams*, 537 F. 2d 829 (5th Cir. 1976). Sheriff Baker's failure to require his deputies to transmit the identifying material described above "caused" plaintiff's continued detention. Plaintiff has made out a prima facie case under *Bryan*, and Sheriff Baker can escape liability only if he acted in reasonable good faith. As the court said in *Bryan*, "[i]f [the sheriff] negligently establishes a . . . system in which errors of this kind are likely, he will be held liable." 530 F. 2d at 1215.

The only real question in this case is whether the sheriff's failure to introduce a policy of sending photographs and fingerprints or his failure to have someone on duty to check plaintiff's identity upon his arrival or during his stay at Potter County Jail was unreasonable.[4] Since plaintiff in no way challenges the subjective good faith of the sheriff, his qualified immunity hangs on the reasonableness of his action

[3] Section 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, *or causes to be subjected*, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

(Emphasis added).

[4] Since the sheriff did not take office until after the warrant had issued in the name of "Linnie C. McCollan," he cannot be held responsible for any conduct by the sheriff's department prior to that time.

or inaction. The sheriff himself testified that it was a standard practice in most sheriff's departments the size of his to send such identifying material. Certainly the jury could have found that he behaved unreasonably in failing to institute a similar policy. Alternatively, the jury might have concluded that comparing the date of birth, as listed in the sheriff's files, with the date of birth on plaintiff's driver's license when he was arrested in Dallas was sufficient safeguard against arresting and detaining the wrong person and that it was reasonable for the sheriff not to require his deputies to take the additional precaution of sending the photographs and fingerprints.

Defendant contends that the existence of the warrant for the arrest of a person named Linnie C. McCollan created a duty in him to arrest and detain the plaintiff. He relies on *Perry v. Jones*, 506 F. 2d 778 (5th Cir. 1975), for the proposition that since plaintiff was arrested and detained on a warrant fair on its face, he has committed no wrong cognizable under section 1983.

Defendant misperceives his duties. His argument would find a duty in a police officer or sheriff to arrest any person who bears the name in which a warrant was issued. A warrant for John Smith would put a policeman under a duty to arrest the first John Smith, or perhaps all John Smiths, he encountered. Such cannot be the law.

We are not saying that a sheriff is under a duty to make an independent investigation as to the guilt or innocence of a person wanted under a warrant. If a warrant was issued for the arrest of an individual and the individual *actually* wanted under that warrant is arrested, the arresting officer has fulfilled his duty, and he will not be liable for false arrest or false imprisonment merely because the person

arrested is later found to be innocent of the charges against him. *Perry v. Jones, supra.* We are saying that the sheriff or arresting officer has a duty to exercise due diligence in making sure that the person arrested and detained is actually the person sought under the warrant and not merely someone of the same or a similar name. *See* Restatement (2d) Torts § 125, comment (d) 1965.

REVERSED AND REMANDED.

DIRECT EXAMINATION

[31] BY MR. LARSON:

"Q Would you tell the jury your name, please?

"A T. L. Baker.

"Q And how are you employed at the present time?

"A Sheriff of Potter County.

"Q And how long have you been the Sheriff of Potter County?

"A Since November 20, 1972.

"Q Now, during the proceedings in this lawsuit I have asked you to seek out your — search out your records and determine whether or not you had any papers regarding the arrest of a man named Leonard McCollan, is that right?

"A That's right.

"Q All right. Now, before we go into that, though, let's talk about what you do when you arrest somebody and take them up to your jail. Suppose I were arrested in Potter County for some charge and I was taken to your jail. What would you do with me first?

"A From the time I arrested you?

"Q That's right.

"A Upon the arrest you would be taken to the courthouse before the magistrate there at the courthouse and then up to the jail at that time.

"Q All right. Well, now. When you got me up to the [32] jail you would take my picture, wouldn't you?

"A It depends on whether you were going to be released immediately or whether you were going to be there a while

whether your picture would be taken, but before your release it would be.

"Q All right. Well, at some time before I was let go you would take my picture, wouldn't you?

"A Yes.

"Q Then you would also take my fingerprints, wouldn't you?

"A Yes.

"Q Now, you take two sets of fingerprints, isn't that right, or do you take three sets?

"A Three sets.

"Q All right. And you keep one in your office; right?

"A Right.

"Q And you send one to the FBI?

"A Right.

"Q And you sent one to the Department of Public Safety; is that right?

"A That's right.

"Q All right. For the benefit of the jury, the Department of Public Safety is in essence the Texas Highway Patrol and the Texas Rangers?

"A Yes.

[33] "Q And they keep records down in Austin as to all the arrests in the State of Texas, is that right?

"A And the FBI is the Federal Bureau of Investigation and they have offices not only in Washington, D. C., but in all major cities and they keep records — that's right.

"Q On people that have been arrested? Is that right?

"A Yes, sir.

THE COURT: Wait a minute. Will you speak out a little louder, I don't know that the jury can hear you.

THE WITNESS: Okay.

"Q (By Mr. Larson) Now, there's one other place where you send information, isn't that true?

"A The fingerprint cards, no, that's the only place we sent them.

"Q Isn't there a computer center called the National Crime Information Center?

"A This is put on your teletype if it is an outstanding warrant only. The information is only put in there where there's an outstanding warrant.

"Q Okay. If there wasn't any outstanding warrant on me?
"A There wouldn't be any information then to send.

"Q But when you put me in your jail you would check to see if there were any outstanding warrants on me anywhere [34] else, isn't that right?

"A Right.

"Q Now from the records in your department did anyone take the pictures of the person we now know is Leonard McCollan?

"A Yes.

"Q Do you know when?

"A October, '72, I believe.

"Q Do we know the exact date?

"A No, sir.

"Q Well, we have a warrant?

"A Not off hand.

"Q We have a warrant, don't we?

"A Yes, sir.

"Q Would you go through these papers and find it for me, the original warrant for Leonard — or Linnie McCollan is what it says on the warrant, but it was actually Leonard McCollan?

"A I don't believe I have it.

"Q See if you have it in this stuff here (indicating).

"A Okay. The original was on the 5th of October, '72.

"Q All right. May we see that?

"A Yes.

MR. LARSON: I would like to have this marked [35] as Plaintiff's One.

(Plaintiff's Exhibit Number One was marked for identification by the Court Reporter.)

"Q (By Mr. Larson) Now, for the record, this is what has been marked as Plaintiff's Exhibit One, and that's the original arrest warrant for a man known as Linnie Carl McCollan, who we now know as Leonard McCollan, is that right?

"A Yes.

MR. LARSON: Offer Plaintiff's Exhibit One.

MR. KNORPP: Your Honor, we have no objections, with this clarification, and that would be that counsel's question

to Mr. Baker was the first arrest of Leonard McCollan and the Sheriff made a response to that and the warrant concerns Linnie McCollan and —

THE COURT: Well, it will speak for itself won't it?

MR. KNORPP: Yes, Your Honor, but the Sheriff will have a date as being the original arrest of Leonard McCollan.

THE COURT: Well, what I understand is being asked — now, is this the warrant you're asking for?

MR. LARSON: Your Honor, I was afraid this was going to happen. They're going to try to confuse everybody with all the records and what not. What I asked from him and what I wanted to know was is this [36] the first warrant that was issued out of Potter County for the arrest of the man known as Linnie Carl McCollan but we now know his true name is Leonard McCollan, and he said "yes".

THE COURT: What is that, Plaintiff's Exhibit One?

MR. LARSON: Yes sir.

THE COURT: And it's for whom?

MR. LARSON: It says: "You are commanded to take the body of Linnie Carl McCollan."

THE COURT: All right, is that the first one, Sheriff?

THE WITNESS: Yes, sir.

THE COURT: All right.

MR. LARSON: Thank you.

"Q (By Mr. Larson) Now, the man that is identified in that warrant was placed in your jail about October the fifth, is that right, of 1972?

"A Tenth of October.

"Q Well, do you need to see the warrant?

"A Yeah. Sixth.

"Q On the sixth of October?

THE COURT: Sheriff, you're going to have to speak up. I don't think the jury can hear you. Don't have a private conversation with him, everybody in the courtroom has got to hear you.

[37] THE WITNESS: Yes, sir.

"Q (By Mr. Larson) So Linnie Carl McCollan or the man that was identified as Linnie Carl McCollan was arrested on the sixth of October, 1972; is that right?

"A That's right.

"Q Now, according to your procedures in your jail, you took this man's picture and his fingerprints at one time or another, didn't you?

"A Linnie Car McCollan that was arrested?

"Q Yes.

"A Yes.

"Q And do you have those pictures there with you?

"A Yes.

MR. LARSON: Would you mark these as Plaintiff's Two and Three?

(Plaintiff's Exhibits Two and Three were marked for identification by the Court Reporter.)

"Q (By Mr. Larson) All right, for the record, these are the photographs, Plaintiff's Exhibits Two and Three, that

were taken of the man identified as Linnie Carl McCollan on or about October 6, 1972, is that right?

"A Okay. This one (indicating) was taken the ninth and the eleventh of '72.

"Q All right.

"A And this one (indicating) came out of the police [36] dapartment on November — this is a police department photo that was taken at that time, on October 6th.

"Q All right. But this is the man that was placed in the Potter County jail? Is that right?

"A Yes, sir.

"Q In October, 1972?

"A Yes, sir.

MR. LARSON: Offer Plaintiff's Exhibits Two and Three.

THE COURT: They're admitted.

"Q (By Mr. Larson) Now, this man that was placed in jail — in the Potter County jail in October, 1972, whose pictures we have just shown the jury and have been admitted in evidence, you took his fingerprints, too, didn't you?

"A Okay. The one where he was placed in jail by the City, his fingerprints would have been taken at the City, but they would not have been taken in our department at that time, it's just a transfer.

"Q He was transferred from the City?

"A From the City over to the County.

"Q Well, now did you take his fingerprints?

"A No.

"Q Nobody in your office took his fingerprints?

"A No, sir.

"Q But you had copies of them?

[39] "A Yes, sir.

"Q Do you have them with you?

"A Let me see.

No, sir, I don't have them here.

MR. LARSON: Counsel, you had them at the time of the deposition. Could you tell me where they might be?

MR. SoRELLE: Those were the copies we tendered. They came off the microfilm and we may have — if you will get the exhibits off the deposition I can show you which ones.

MR. LARSON: They didn't put my exhibits on the deposition.

MR. SoRELLE: Mine weren't either.

MR. LARSON: Well, now, Counsel, you promised me that you would have all this stuff.

THE COURT: Let's not have a private discussion. What's your question?

MR. SoRELLE: Your Honor, I think Mr. Larson and I have an agreement on what we were going to do but in fact the items that we furnished at the time of deposition are attached to the original deposition as filed here.

THE COURT: What do you want now?

MR. LARSON: The fingerprint card that they had [40] on this man known as Linnie McCollan which they had in their possession in October, 1972.

THE COURT: The Sheriff doesn't have them there in that file?

MR. LARSON: No, sir.

THE WITNESS: No, sir.

THE COURT: What about these? (Indicating.)

MR. KNOPP: Your Honor, we did not have possession, either at the time of the deposition or now, other than on microfilm, and that's what we have in the deposition here that you have handed Counsel.

"Q (By Mr. Larson) Now, is that the fingerprints you had access to?

"A Yes, sir.

MR. LARSON: Let's have those marked, if you would.

(Plaintiff's Exhibit Number Four was marked for identification by the Court Reporter.)

MR. LARSON: Offer Plaintiff's Four.

MR. KNORPP: No objection.

THE COURT: They're admitted.

"Q (By Mr. Larson) Now, referring to Plaintiff's Exhibit Four, isn't there a method by which a person's fingerprints are classified?

"A Yes, sir.

"Q And would you explain how? I don't want you to [41] explain how it's done but explain generally what happens when you classify someone's fingerprints.

"A Well, the I. D. technician or someone who is skilled in classifying them will classify the prints to points of identification on each print.

"Q All right. And he will assign some number code to them, isn't that right?

"A Yes, sir. It depends on which system he uses, the Henry System or several other systems that they have.

"Q All right. Then after they're classified, then they're sent down to the Department of Public Safety, isn't that right?

"A No, sir. We don't classify any prints that we send to the Department of Public Safety.

"Q The Department of Public Safety then classifies them?

"A Yes, sir.

"Q Then after you classify your prints for the public — after the prints are sent to the Department of Public Safety, then you can request what is known in the trade as a "rap sheet", isn't that right?

"A Yes, sir.

"Q And tell the jury what a rap sheet is.

"A A rap sheet is the criminal history sheet of the man who fits that fingerprint classification: name and date [42] of birth.

"Q So the Department of Public Safety classifies people by their fingerprints and doesn't necessarily rely on their names; isn't that true?

"A That's right. True.

"Q So we might know then that the man who was arrested in October, his fingerprints were sent to the Department of Public Safety in Austin some time about that date; is that true?

"A Yes, sir. After his arrest at the City when they would have sent them then.

"Q So then someone would have got what's called a rap sheet back from the Department of Public Safety, isn't that right?

"A Yes, sir. The agency which submits them automatically gets a set of fingerprints back.

"Q How long does that take?

"A It depends on the work load of the DPS. It's hard to judge.

"Q In this case how long did it take?

"A It would be hard to say. We get them back sometimes in a week and sometimes longer.

"Q What's the longest they have ever come back?

"A I don't know right off hand how long it's taken them.

[43] "Q Well, by two months would you have them?

"A Should have, yes.

"Q Let's say thirty days?

"A Possibly.

"Q You should have them by thirty days, right?

"A If the work is not stacked up; you know, if it doesn't hit them down there.

"Q Well, do you have anything in your records or anything to indicate when you got the information, the rap sheet back?

"A Okay. In our records we don't have anything to indicate that we got the rap sheet, when it come back.

"Q You don't have anything that indicates you got the rap sheet?

"A No, sir.

"Q Well, did you and the City of Amarillo kind of change out information?

"A We do on occasions, yes.

"Q So the City is the one that arrested this man, Mr. McCollan, the first time, is that right?

"A That's right.

"Q So they would have had a rap sheet; isn't that right?

"A Yes, sir, they should have.

"Q And you would have had access to it; true?

[44] "A Yes, sir. If we would have went over there.

"Q All right. Then it would have been easy for you to find out what this man's rap sheet was; isn't that right?

"A If we would have went to the City, yes, sir, we would have had access to the rap sheet.

"Q Well, in this situation, it's a little stronger than that, isn't it? Do you remember your deposition on page thirty-seven where I asked you this question: So your department in all likelihood knew that at the time Linnie McCollan — and I was referring to the Plaintiff — was arrested in Dallas County that Leonard was using an

alias? And your answer to that was: Yes. Then you said: My I. D. people. Question: Should have known? Answer: Yes.

"A Right.

"Q Is that right?

"A At the time that we gave you that deposition it was my understanding that we would have had that information but checking further we found that the original arrest was made by the City and it was a transfer.

"Q Are you changing your testimony now?

"A I'm saying that we didn't have — after we left there, after we give you the deposition, I went back and went through my files and found that it was a transfer and we did not have a rap sheet because it was sent in by the City.

"Q So you're changing your testimony now?

[45] "A Yes. From that.

"Q Did you file your deposition?

"A Yes, sir.

"Q Do you change it in the deposition you filed?

"A No, sir.

"Q All right. Now, when you arrested this man known as Linnie McCollan — pardon me. When he was placed in your jail he had a driver's license, didn't he?

"A Is this Linnie McCollan, Leonard McCollan alias Linnie McCollan, the one you're talking about?

"Q Yes, sir.

"A Yes, sir.

"Q Do you have that driver's liense?

"A I should have, yes, sir.

"Q And when did you take this? You took possession of this driver's license at some time, didn't you — your office did?

"A The Officer in my department had possession of it.

"Q All right. Well, that would have been what? In October?

"A Yes.

"Q Well, do you ordinarily take up someone's driver's license?

"A No, sir.

"Q Well, why was this one taken up?

[46] "A Because it was an altered I. D. or altered driver's license.

"Q How was that determination made?

"A By the information that was on the driver's license and the picture.

MR. LARSON: Let's have this marked.

(Plaintiff's Exhibit Number Five was marked for identification by the Court Reporter.)

MR. SoRELLE: Your Honor, we would ask that the whole amount there be tendered. It was taken off and evidence tagged which has certain markings that identify the license.

THE COURT: Well, I would think that would be better than putting the Court Reporter's little stamp over some par of the driver's license.

MR. LARSON: Well, Judge, I don't know what this is (indicating).

THE COURT: Well, it's possibly just an identification of the license.

MR. SoRELLE: Your Honor, it indicates certain items of who had custody of the license and who took possession of the license and when the Sheriff's Department took possession of the license and so forth.

THE COURT: Well, that can be proved up.

MR. LARSON: I'm not interested in that. When I [47] saw the driver's license the first time —

THE COURT: I've ruled on it. It can be proved up.

"Q (By Mr. Larson) All right. Now this is the driver's license that one of your officers in your office took up from Leonard McCollan in October, 1972; is that right?

"A That's right.

"Q And you said it had been altered, who made that determination, did you or did someone in your office?

"A The officers in my office.

"Q What was altered about it?

"A They determined that the man's picture on here was not the man whose name and date of birth appears on the license.

"Q Well, after you learned that or after your office learned that, what did they do about trying to switch the

names around on all these warrants? Did they tell anybody?

"A No, sir. We didn't have that information in our I. D. at the time.

"Q Well, you said you got it in October.

"A Yes, sir. The man who had possession of this license was assigned to our metro unit.

THE COURT: Was what?

THE WITNESS: Assigned to our metro unit, which is — he offices out of the City Police Department.

[48] "Q (By Mr. Larson) Is he one of your deputies?

"A Yes, sir. These files are in the City.

"Q So one of your deputies knew that the picture on there was wrong, is that right?

"A Yes, sir.

"Q Well, was anything done about straightening out the picture — I mean straightening out the problem, there was a man who had a phony driver's license and who was using somebody else's name?

"A The only thing, this was taken into evidence and that's the only thing that was done on it at the time.

"Q So nobody told anybody that the man's real name was Leonard McCollan as the result of taking up this driver's license; is that right?

"A Not that I'm aware of.

"Q Now, later on in 1972 the bondsman, for whatever reason, he wanted to file some kind of application to go off his bond, is that right?

"A That's true.

"Q So we make everything crystal clear, the bond we're talking about that a bondsman had posted on behalf of Leonard McCollan who was using the alias of Linnie McCollan, is that right?

"A Yes, sir.

"Q Do you have that affidavit to go off his bond?

[49] "A Yes, sir.

"Q Now, as a sheriff, one of your functions is to take bonds on behalf of people; isn't that right?

"A Yes, sir.

"Q In fact, you're the only officer authorized to take bonds on behalf of people who are incarcerated; isn't that right?

"A Yes.

"Q You're the only person in Potter County?

"A Other than the Judge.

"Q But you keep the bonds, approve them and check out the bondsmen's property and that sort of thing; is that right?

"A Yes, sir.

(Plaintiff's Exhibit Number Six was marked for identification by the Court Reporter.)

"Q (By Mr. Larson) Now this has been marked as Plaintiff's Exhibit Six, and that is the affidavit or the "motion of surety for warrant". In other words, the surety, the bondsman who posted the bond for Mr.

Leonard McCollan, wanted to go off his bond; is that right?

"A That's right.

"Q And that was granted?

"A Yes, sir.

"Q And what happens when that is granted?

[50] "A When this is granted, then a warrant is received in our department for the subject.

"Q All right. Well, this is dated the third day of November, 1972. So that would be the date that a warrant was issued for him; is that right?

"A Yes, it should have been.

"Q Do you have that warrant there?

"A Yes, sir.

(Plaintiff's Exhibit Number Seven was marked for identification by the Court Reporter.)

"Q (By Mr. Larson) We have had this marked as Plaintiff's Exhibit Number Seven. Now, that's the warrant that was issued as a result of the bondman's actions in this case?

"A Yes, sir.

"Q Now I notice that the warrant says: "You are commanded to take the body of Linnie Carl McCollan". There is nothing on here to indicate that he was using an alias.

"A No, sir.

"Q Why not?

"A I don't know, sir.

"Q Well, one of your deputies had already taken up a driver's license and knew that he was using the wrong name; is that right?

"A That's right.

[51] "Q And you probably have access to a rap sheet that came back from Austin that indicated he was using the wrong name; is that right?

"A If he had went to the City, yes, sir.

"Q Well, in your deposition you said: So your department in all likelihood knew at the time that Linnie McCollan was using an alias, giving the wrong name, isn't that true? And you answered: Yes.

"A Yes, sir.

"Q Now, let's move forward a little bit, and when did your office first learn that the Plaintiff in this lawsuit was arrested?

"A The exact time, I don't know. It was around December 26th.

"Q All right. Well, how did you find that out?

"A By teletype.

"Q Do you have a teletype there?

"A No, I don't believe it is. I don't have the teletype.

"Q Do you know where it is?

"A No, sir.

"Q Did you get a phone call?

"A I don't know.

"Q Well, did anybody in your office get a phone call?

"A I don't know.

[52] "Q Have you done any checking around?

"A The man who was the head of my criminal division at that time is no longer with me and he's up in Oklahoma. He would have been the one who would have gotten the phone call if there were a phone call.

"Q All right.

"A He would have either got the teletype or the phone call.

"Q What did your — you got this notice on the teletype that my client had been arrested, or at least a Linnie Carl McCollan had been arrested. What did you do about that?

"A Okay. As with any warrants or any people that's arrested on warrants, then we send someone as soon as possible. As soon as we have a car or a man available we send them and pick them up if they have not made bond at that time.

"Q So did you send someone to pick up Mr. McCollan?

"A Yes, sir.

"Q When was that?

"A On the 30th, I believe, 29th or 30th.

"Q All right. I have an old calendar here and it indicates that the 26th fell on a Tuesday.

"A Yes, sir.

"Q Is that —

THE COURT: Now, this is the 26th of 1972?

[53] MR. LARSON: The 26th of December, 1972.

"Q (By Mr. Larson) Does that coincide with your recollection?

"A I don't know. Let me look at the calendar.

"Q All right.

"A Right. It is on a Tuesday.

"Q. Now, did y'all send any photographs or fingerprints or anything down to Dallas to find out to be sure that you had the right guy?

"A Not to my knowledge, no, sir.

"Q Well, you do that now, though, don't you?

"A Yes, sir.

"Q And part of the reason you do that now is because of what happened in this situation, then; is that right?

MR. SoRELLE: Your Honor, I'm going to object to this line of questioning. I think what the Sheriff's office does or doesn't do now is clearly —

THE COURT: I'll sustain the objection.

"Q (By Mr. Larson) Well, that's the ordinary thing done at Sheriff's offices about your size; Isn't that right? You have checked around and learned that the ordinary practice is that they forward a copy of the man's pictures and fingerprints to be sure they have the right one; isn't that right?

"A Usually you don't forward one if you go. You take [54] them with you.

"Q Well, you didn't get down there until the 30th, which was the following Friday. That was four days later?

"A That would be the 29th, I believe, would be Friday, wouldn't it?

"Q It was a Friday. Well, that was the 30th, wasn't it?

"A Was the 30th on Saturday?

"Q Well, all right, it's the 29th. I stand corrected.

"A Twenty-ninth.

"Q Twenty-ninth, all right. Well, do you have anything in your file to indicate what time this man got to your jail?

"A Just the date, not the time.

"Q All right. What date is that?

"A On the 30th.

"Q Thirtieth?

"A Yes, sir.

"Q Well, that was the day he was checked into your jail?

"A Yes, sir.

"Q Now, you have a policy in your office that you're supposed to, as soon as a man is arrested and brought in, you take him to I. D.; isn't that right?

"A No, he's taken to the jail.

[55] "Q You don't check to be sure you have the right person?

"A The people up in the jail check your I. D.

"Q Well, when did Mr. McCollan get let loose?

"A On the 2nd, I believe.

"Q The 2nd of January, 1973?

"A Yes, sir.

"Q Well, he was booked in your jail on the 30th, but he wasn't let go until the 2nd. Why did it take so long to figure out you had the wrong one?

"A Okay. The 30th, of course, is on Saturday with the 1st being a holiday. There was no one in I. D. during the weekend or the holiday, and then the 2nd is when all of the jail work and the paper work comes through.

"Q So you're saying that on the weekend it's not — and on holidays it's not important to be sure that you've got the right person?

"A No, I'm not saying that. I'm saying that we didn't have anybody in I. D., you know, at that time.

"Q Well, don't the jailers, as just a practice, you know, take pictures and fingerprints of folks when they bring them in?

"A Yes, sir, but they can't take — after they take the picture and fingerprints they have to check through I. D. — the paper work has to go through I. D. before you've got any.

[56] "Q Well, where is I. D. in juxtaposition to your jail?

"A Okay. Our jail is on the seventh and eighth floor of the courthouse and the identification and records is on the main floor, south end.

"Q Well, did anybody ever take the Plaintiff's picture and fingerprints?

"A I don't really know at this point. I can's find any in our records.

"Q Well, now, in your deposition you told me they got tore up.

"A Well, this was the instructions that I had — that we give them if it has been taken to tear them up and destroy them.

"Q So that's what happened to the Plaintiff's pictures and everything, they got tore up?

"A Yes, sir. If they were taken, they were torn up.

"Q Well, now, you're not even certain if they were taken or not?

"A That's right, sir.

"Q All right. Well, now, did your deputies that went down here to Dallas to pick up the Plaintiff, did they have a warrant?

"A Yes, sir.

"Q Can you show us that warrant?

[57] "A I believe you've got it.

"Q Well, now —

"A This would be the warrant they had.

"Q Well, now, on the back side of this it says: "Came to hand 31st day of November," it looks like '73 but you can't tell because it's been scratched out. It looks like it had a four in there at one time. And it's executed the 21st of January, 197 ... and then it might be 3 or 4.

Now, this can't be the warrant because it's not executed with the proper date on it. If you went down there — if your deputies went down there on the 30th.

"A This warrant is the one that they picked him up on and they brought him back and he was released before he

was taken before the magistrate and so he wasn't taken back to the magistrate and, therefore, the warrant wasn't executed.

"Q Well, you mean you don't execute — you don't fill out the little execution on the back until later on?

"A Not until you take him back before the magistrate that issued the warrant.

"Q Well, now, Leonard McCollan had already been before the magistrate?

"A Not on this warrant. This is on the bond withdrawal warrant.

"Q Now, I started to go into an area a while ago and I want to go back to it.

[58] Isn't it standard proceedure in offices — sheriff's offices of your size and counties of your size to send pictures of the person who's wanted along with the fingerprints; isn't that standard in —

"A At what time?

"Q Well, at any time.

"A Whenever they go to pick up someone?

"Q Yeah.

"A If there's any doubt of their identity they do, yes.

"Q Well, now, you already had some doubt of the identity, didn't you?

"A At that time, no, sir, I didn't.

"Q Well, somebody in your office did, didn't they?

"A Possibly the man that handled Leonard the first time probably did.

"Q And whoever got that driver's license knew it, too, didn't they?

"A That would have been the same man — one and the same man. One and the same officer.

"Q And he doesn't work for you any more?

"A No, sir, he still works for me.

"Q Well, what reason did he give you for not telling you?

"A It probably wasn't even brought to his attention [59] the man was arrested. At that time he was working in metro.

"Q Well, I know it, but he had arrested somebody in October or in December — pardon me, in September, and he had taken up a driver's license because it had the wrong picture on it and he didn't tell you about it?

"A No, sir.

"Q No reports made of it?

"A If they were, they were in his file.

"Q Well, you were relying on your deputies to do the right thing, weren't you?

"A Yes, sir.

"Q And you were a new sheriff and weren't aware of all the procedures; is that —

"A At the time this was discovered by that deputy, he worked for the previous sheriff, and this case — in other words the first arrest and everything was back before I was made sheriff, so I wouldn't have known. The warrant was already in our file.

"Q So you were new and relying on all your deputies to do the right thing; is that right?

"A Yes, sir.

"Q When you found out that you placed your reliance on the wrong people did you do anything about it?

"A Yes. sir.

"Q What?

[60] We —

MR. SoRELLE: I'm going to object to what was done or not done on the basis of being irrelevant to what the action is in this case.

THE COURT: Well, are you asking about a change in policy or what was done with reference to this particular matter?

MR. LARSON: The latter.

THE COURT: Well, I'll overrule the objection to what was done with reference to this particular matter.

"A We changed our policy on — after this one was —

THE COURT: Well, now, I'll sustain the objection to changing policy about it. I don't think that's material. It's what happened on this occasion.

"Q (By Mr. Larson) Did you do anything to this deputy?

"A No, sir.

"Q Why not?

"A I felt like the deputy had done his job.

"Q Then you approved of the job the deputy did?

"A No, sir.

"Q Well, you felt he had done his job?

"A Yes, sir. The policy at that time. He continued as he had been and —

"Q Isn't it important, Sheriff, that if you've got [61] information that indicates that you got — the man is using an alias name, isn't it important that somebody gets to know about this?

"A Yes, sir.

"Q You just don't leave that sitting in your file; isn't that right?

"A It depends on the case at hand whether it would be left in those files or not.

"Q But the standard policy in all sheriff's departments of your size is when someone is arrested out of county or out of state that photographs and fingerprints are taken to determine whether or not they got the right person; isn't that right?

MR. SoRELLE: Your Honor, I'm going to object again. He's asking about something irrelevant, what the standard policy is in all departments and I object on the basis that it's not relevant to this litigation.

THE COURT: I'll sustain the objection.

MR. LARSON: Your Honor, may I address the Court?

THE COURT: Yes.

MR. LAWSON: In his deposition — well, maybe I shoulden't tell it in front of the jury.

THE COURT: Well, let's take a recess right at this time, ladies and gentlemen. About a fifteen minute recess.

[68] MR. LARSON: Before you leave the bench, I have another witness and the City Attorney agreed to produce

him and he's a police officer and left the City Attorney where he could be reached and the City Attorney has tried this number and it's not a working number. This witness is going to be out of pocket and there's a problem about trying to find him and I just want the Court to realize that I may have to call a witness out of order tomorrow.

THE COURT: All right.

(A recess was had.)

THE COURT: All right. Bring in the jury.

(Jury in.)

THE COURT: Let's proceed.

CONTINUING DIRECT EXAMINATION

BY MR. LARSON:

"Q Shortly after this incident occurred you made a determination of the standard kind of operating procedure in counties the size of Potter County do in regards to when someone is arrested outside the county; isn't that true?

"A Yes.

"Q So the procedure you found out was that mug shots and fingerprints would be mailed down as soon as the notice of a warrant — notice of arrest to someone wanted under a warrant; isn't that the standard procedure?

[69] "A It would either be mailed or taken down.

"Q Yes. Well, did any of your deputies mail anything down to Dallas to the Dallas Police Department?

"A No, sir.

"Q Did either of your deputies take much mug shots or were the fingerprints with them when they came down to Dallas to pick him up?

"A No, sir. Not to my knowledge.

"Q Have you made any determination of what information was on the computer with the National Crime Investigation Center — Information Center, pardon me, at the time or just prior to the time that the Plaintiff was arrested in Dallas?

"A No, sir. I don't know what was all on there. I don't know exactly what was in there because there's a number of different things that you can put in the computer.

"Q For example?

"A For example, you can put all the information that you have on the subject, his name, date of birth, DL number if you have it, warrant, what he's wanted for and the charge and any other information that you might have at that time.

"Q Like what?

"A Well, like physical description if you have any.

"Q Well, how about the numbers that indicate what kind of fingerprints a man has?

"A No, sir, we usually don't put any fingerprint [70] classification in there.

"Q So you don't know what was in the NCIC computer just at the time this man was arrested?

"A No, sir. This was put in prior to me being in the sheriff's department.

"Q Well, have you made any investigation to find out?

"A Okay. When they are arrested, then that information is cancelled out of your computer and you cannot retrieve it.

THE COURT: I believe if you would sit back a little, Sheriff and not so close to that mike it might do better.

"Q (By Mr. Larson) Now, Sheriff, if you would, describe the vehicle that you used to transport prisoners from one county to another; do you have more than one or do you use primarily just one vehicle?

"A We have a station wagon and then we use any other cars. It depends on what car is available, just a regular patrol car. But, it depends on what car is available at the time.

"Q Can you tell us what pressing business there was that prevented you from going from Amarillo to Dallas, waiting four days? Can you tell us what it was?

"A As far as knowing exactly what it was at that time, the reason we didn't send anybody the next morning, I . . .

. . .[82] arose, what did you spend your time doing these as Sheriff of Potter County?

"A Mostly just administrative work, trying to find out just what the department was doing and if here was any areas that needed changing, what changes to make and just really getting my feet on the ground as to what kind of department I really had at that time.

"Q Did you come in and institute immediately new policies and new procedures in the office?

"A No, sir.

"Q What procedures and policies was the office running by when you took over?

"A They were running under the old policies of the previous sheriff.

"Q What had happened to the previous sheriff?

"A He had died in office.

"Q Was it an expected death or was it sudden?

"A No, sir. It was a sudden death.

"Q How many employees did you inherit, so to speak, from the old sheriff's department to the department that you had during the month of December of '72?

"A All but two of them, of the people that was previously hired were rehired.

"Q In response to a question earlier as to three sets of fingerprints being taken by your department, when are [83] three sets of fingerprints taken of an arrestee?

"A When the arrest is made by the sheriff's department?

"Q That is made under your order or made by your officers?

"A Made by my officers.

"Q Well, what if an arrest is made by, say, the police department and an individual is transferred to your department, do you make three sets of prints then?

"A No, sir.

"Q Why not?

"A Because it shows as just a transfer and the FBI card and DPS card are made over at the police department and it cuts out the duplication of making an extra set of prints — two sets of prints.

"Q You mentioned earlier that one of your deputies had some sort of notice of a driver's license that was on the Linnie Carl McCollan who was arrested in October of 1972. Who was that deputy?

"A Okay. That would be Ed Porter.

"Q Was he assigned to your office at that time?

"A No, he was a deputy working for me, assigned to metro, but his office was in the City police station.

"Q What is metro?

"A It is an intelligence unit that has in it one [84] deputy from my department, one from another county, and then one from another county and the City of Amarillo and the City of Canyon have men in it, and it's a specialized unit.

"Q What did they work with primarily?

"A Mostly they work on vice and narcotics.

"Q During this time period did you have direct daily control over the procedures and activities of Ed Porter?

"A No, sir. They would be as it is now. There are lots of times that go by that we may not see that deputy for as much as two or three weeks.

"Q He didn't report to you day to day as to his activities?

"A No, sir. He reports directly to the metro unit and to their coordinator and works directly under him.

"Q Did Mr. Porter office in the courthouse where your sheriff's offices were?

"A No, sir.

"Q Were any of these records under anyone's control other than Mr. Porter at that time?

"A No, sir. Just the coordinator of the metro unit, because they were housed at the police deparment.

"Q Is he under your control?

[85] "A No, sir.

"Q Did you have any authority over metro and its policies or procedures?

"A No, sir. Not at that time.

"Q How is metro funded?

"A It's funded through a criminal justice grant.

"Q What is that?

"A It's funded through the State Criminal Justice Division.

"Q Is that a Federal grant?

"A Yes, it's a Federal grant.

"Q Who sets the policies and procedures of metro intelligence?

"A The Board of Directors.

"Q Referring back to the question that you answered then, although Mr. Porter was your deputy and you say that he may have had notice of this driver's license, was there any reason for that notice to have been reported to you or anyone under your direct control?

"A No, sir.

"Q Why not?

"A If it was a pending case worked out of metro then the case, until it is completed, is kept and held in metro.

"Q Were any of those metro files available to you or any of your deputies other than Mr. Porter?

[86] "A No, sir.

"Q Even if you had requested them?

"A The only ones that — we would have to request them through the D.A.'s office.

"Q You indicated earlier that you had two photographs before you of Linnie Carl McCollan and you identified those photographs, one that's been marked Plaintiff's Exhibit Number Two. And can you identify who took that photograph and what the date was?

"A Yes, sir. This is the Amarillo Police Department photo in October of 1972.

"Q And Plaintiff's Exhibit Number Three, can you identify from looking at that photograph when it was taken and by whom?

"A Yes, sir. This was taken by the Sheriff's Office on September 11, 1972.

"Q The warrant you had earlier referred to, issued on the 5th of October, 1972, being Plaintiff's Exhibit Number One, was this issued apparently after the photograph that was taken in Plaintiff's Exhibit Three?

"A Yes, sir.

"Q Would tht indicate that there might have been an earlier warrant issued back through your department for Linnie Charles McCollan?

"A Yes, sir.

[87] "Q Or, Linnie Carl, I'm sorry.
Would that be the indication?

"A Yes, sir.

"Q Can you tell from looking at the picture which is Plaintiff's Exhibit Three what the particular offense might have been that the Defendant Linnie Carl McCollan was arrested for?

"A No, sir.

"Q Further examining Plaintiff's Exhibit Number Four, which is microfilm copies of the same photograph, as is Exhibit Three, plus a fingerprint card, can you tell by examination of the copy of that card when those prints were made?

"A Yes. These were made on the 9th and 11th of '72.

"Q Would that have been prior to the warrant that was issued on the 5th of October of '72?

"A Yes.

"Q Does that or does not that indicate to you, Sheriff Baker, that there was a Linnie Carl McCollan that had been handled by your department earlier than October 5th of 1972?

"A Yes.

"Q Do any of those records in any respect whatsoever show an alias of Leonard McCollan?

"A No, sir.

"Q Were you or anyone in your department — in your [88] I. D. section or your department aware that there was

anyone but a Linnie Carl McCollan, that one individual, any time during the months from September, 1972, until January 2nd of 1973?

"A No, sir.

"Q You were unaware that there were two McCollan brothers?

"A Yes, sir.

"Q There was no indication on any records from the FBI or any other source that there might be another McCollan named Leonard McCollan?

"A No, sir.

"Q The pictures that you have identified as being Linnie Carl McCollan, are they of this Plaintiff?

"A No, sir.

"Q Let me refer also, Sheriff Baker, to your comment about checking a rap sheet to see if there might have been an alias used. Did your department receive, as far as your records show, any type of rap sheet that would give you notice that there was another Linnie Carl McCollan anywhere else in the world other than the one that you have pictured there?

"A No, sir.

"Q You mentioned that the City might have a rap sheet. Did you know that the City had a rap sheet?

[89] "A No, sir.

"Q Did they have a rap sheet?

"A I didn't check.

"Q You don't know today?

"A I don't know whether they have one or not.

"Q So when you say that your deputies knew that there was an altered driver's license, in fact you were referring to Mr. Porter, were you not?

"A Yes.

"Q Who didn't work under your control at that time?

"A No, sir. He was in the metro unit.

"Q Who took that driver's license into evidence?

"A Mr. Porter.

"Q Did he take it in as an authority as your deputy?

"A Yes, working in metro.

"Q Did you know that that driver's license was in evidence anywhere?

"A No, sir. This was all taken into evidence back before I was Sheriff.

"Q When was the first time you ever saw that driver's license that you're holding there and refer to it, please, by the Plaintiff's Exhibit on the back?

"A This exhibit, Number Five, the first time I seen this driver's license was on January 2nd, when we released Mr. McCollan.

[90] "Q Of 1973?

"A 1973.

"Q Had you no knowledge of that license before that time?

"A No, sir.

"Q Looking at the picture on that license, do you find that picture to be of this Plaintiff?

"A No, sir.

"Q Do you find the name to be Linnie Carl McCollan or Linnie C. McCollan?

"A Linnie C.

"Q And the birthday of 12/8/48?

"A Yes, sir.

"Q And a Texas DL number thereon?

"A Yes, sir?

"Q Have you or any of your deputies done subsequent investigation to see whether or not that birthdate in that driver's license number is the one commonly used by this Plaintiff?

"A Yes, sir, it is.

"Q Did you have a conversation with this Plaintiff about that fact on this day of the 2nd of January, 1972?

"A Yes, sir.

"Q '73, I'm sorry.

"A '73.

[91] "Q Did he acknowledge that to be his name and license number and birth date that he used on his driver's license?

"A Yes, sir. He said that this was his driver's license, date of birth, with the exception of the picture.

"Q Did he make any comment to you at that time about that being his brother pictured on the license?

"A Yes. He said that was his brother's picture on the license and that he was using it — using his name again.

"Q Using his name again?

"A Yes.

"Q Did he indicate how the brother had secured that particular driver's license?

"A No, sir.

"Q Referring back to your answer concerning the photographs and fingerprints that may or may not have been made of this Plaintiff when he was brought into your jail, do you know now, today, Sheriff Baker, whether or not there were any photographs made of this Plaintiff when he was arrested in December of '72?

"A No, sir.

"Q Do you know whether there were any fingerprints made at that time or not?

"A No, sir.

"Q If there had been, what were your orders in that regard?

[95] "Q Do you hold any positions in the State presently that are appointed by the Governor that has to do with jail standards and conditions?

"A Yes, sir. I'm on the Board of — Commission of Jail Standards.

"Q And when were you placed on that Board?

"A October the second of this year.

"Q Referring back to the time of the facts of this case, did you have personal contact or personal knowledge of any of these facts until January 2nd of 1973?

"A No sir.

"Q Did anyone prior to that time take any action under your direct control or at your direct order to do or not to do anything as to this particular Defendant?

"A No, sir.

MR. KNORPP: I'll pass the witness to Mr. SoRelle.

CROSS-EXAMINATION

BY MR. SoRELLE:

"Q Do you know where you were between the dates of December 30th, 1972, and January 2nd, 1973?

"A No, sir, not off hand. I was either at home or at my father-in-law's, which would be out in the country.

"Q Were you keeping regular office hours during that period?

"A No, sir.

[96] "Q Did you have communication with your office?

"A Yes. By telephone and radio.

"Q If there had been a problem in the jail, would someone have communicated this to you?

"A Yes.

"Q Had you, back at that time, notwithstanding your other items we have discussed, set up procedures for receiving information when a problem, something out of the ordinary occurred?

"A Yes.

"Q How did you receive communication from the jail?

"A We received it from supervisors up there, as well as any problems that we were having there, the inmates can write a letter and it comes directly to me there in the sheriff's office every morning — comes up to my desk every morning.

"Q Was this procedure in effect at that time?

"A Yes.

"Q Did anyone during this period of December 30th to January 2nd notify you of the presence of Linnie McCollan in your jail.

"A No, sir.

"Q Did anyone notify you of any complaint or problem about his presence there, then or at any time afterwards?

"A No, sir.

[97] "Q When was the first time?

"A The first time I was notified was on January 2nd.

"Q Right. And as soon as someone told you about the fact that there was a question about this man being in jail, what was your initial action?

"A As soon as the problem was brought to my attention, well, I told them to go get him and bring him down out of the jail and down to the captain's office and we would talk to him there.

"Q And who was this that came in to talk to you at that time?

"A Ed Porter.

"Q All right. And this is the man that you have discussed here earlier with the metro unit?

"A Yes.

"Q And did he hand you something or give you anything that caused you to support his statement that this was not the man that he had previously arrested?

"A Yes. He showed me this driver's license.

THE PLAINTIFF: That's a lie.

"Q (By Mr. SoRelle) What did you do then with respect to — was anyone else involved in any of these conversations that you had?

"A Yes. After talking with Mr. Porter we did bring Mr. McCollan down to the captain's office and talked to him [98] there in the captain's office with Kenneth Chambers and Mr. Porter. And Mr. Chambers, of course, is no longer with me.

"Q Now, I think you — and you made the determination on your own that he would be released; is that correct?

"A Yes, sir.

"Q What did you do then?

"A We released him to come back to Dallas.

"Q Did you have someone to provide transportation?

"A Yes. The bondsman, Mr. Carter, — Johnny Carter, advised us that he would provide him with transportation back to Dallas?

"Q Is this the same bondsman that caused the warrant to be issued?

"A Yes.

"Q There was a discussion earlier concerning delays in time when someone has mug shots taken and comparison

by I. D. at some future time. As a matter of fact, you have to develop these photographs, do you not?

"A Yes.

"Q Is there any lag time just from the standpoint of developing?

"A Yes. It depends on — back at that time it took longer because we had an old processer and developing took longer. They would take the pictures and take them down and develop them and it would take some day or two sometimes, [99] depending on how many pictures we had.

"Q Now, did you offer to assist the Plaintiff in any other way at the time he was released?

"A Yes. He told me that when he was arrested here in Dallas that he was working at that time for a messenger service or something of this type and that he had lost his job by being arrested, and I advised him that when he got back to Dallas that if he would contact his supervisor and have his supervisor call me that I would verify that he wasn't the Linnie McCollan that we were looking for. And in about two days — I forget, it was two or three days, anyway, his supervisor did call me and I did verify that he was in our jail and that he wasn't the one we wanted.

"Q You verified that he should not use this arrest as a basis for —

"A Right. That he wasn't the one.

"Q All right.. Sheriff, you weren't I take it, pleased with the fact that there was some confusion about the identity of this man?

"A No, sir.

"Q But from the standpoint you were asked about before of the deputies, certainly you do not — did not condone anyone arresting the wrong man?

"A No, sir.

"Q And at this time, was it your belief that there [104] know what you were doing, is that a fair statement of what you said yesterday?

"A I think I said that I was new and a lot of this happended before that I became Sheriff, and I wasn't aware of all of it, I think that would be a more correct statement on it.

"Q Well, then, you're not trying to tell the jury you're not qualified to be Sheriff?

"A No.

"Q Okay. Now, Sheriff, I believe you testified that this Mr. Porter, I believe his name is Ed Porter, is that right?

"A Yes.

"Q Was working as a metro squad officer, is that right?

"A That's right.

"Q Well, now, was that his only job?

"A Yes. He worked metro and the way I work a metro agent, in metro he works there, then he has his duties in I. D. He works back and forth from I. D. to metro.

"Q And he's the one who figured out they had the wrong one in jail?

"A Yes.

"Q Well, now, in your deposition, you testified thusly on page thirteen, what had this deputy done that [105] made him believe that he had the wrong person in jail and you answered that Mr. Porter at the time was working in I. D. He works kind of relief in I. D., I. D. as well as the jail. He works the dispatcher's stand but at the time he was working in I. D., when the process of the papers came through I. D., this is when he had Mr. McCollan but it was the wrong one in checking these records, their records.

And I asked this question, what papers did he process through and you answered the normal papers that process through our jail which would be the warrants and our jail records. He also handled the mug and printing up in the jail and goes up into the jail and takes money and fingerprinting and jail work and takes it down to I. D. to check previous records, or whatever.

"A At the time I gave that deposition that was exactly what I thought Ed was doing at that time. But upon getting back to the office and along about this time Mr. McCollan was arrested and brought down is when a lot of changes were being made in my personnel and he was working over in metro and I. D. also. In other words, he was working two or three jobs there.

"Q So he was working in I. D., too?

"A Yes.

"Q At the time Mr. McCollan was in jail?

"A Yes.

[106] "Q And he's also the same one that picked up his driver's license?

"A That's right.

"Q Well, now you didn't change your deposition that you filed with the Court, did you?

"A No.

"Q All you're doing today then, as I understand, you're just adding —

MR. SoRELLE: Your Honor, I'm going to object to the continual questions concerning the changing of depositions because it is prejudicial in that it indicates he could have or should have when in fact that is not correct.

THE COURT: Well, I will overrule the objection, however, let's not argue with the witness except finding out what he is testifying to.

MR. LARSON: I will withdraw the question. It was argumentative, Judge.

THE COURT: All right.

"Q All right, Sheriff, one thing I want to be clear about is up in the jail or somewhere in your department you keep a file on everybody that you have arrested, isn't that right?

"A In I. D.

"Q And you call that a folder?

[107] "A Yes.

"Q Well, tell the jury all the things which would have been in the folder for Leonard McCollan at the time he was arrested, say, in October.

"A Okay. In October all we would have in our folder about him being arrested, talking about Leonard McCollan, by him being arrested at the City, he was arrested as Linnie McCollan and he was transferred as that. And so all we

would have in our folder was the transfer, a P-3 on where he was arrested over there and they make a copy of that P-3 and bring it over to us and then that goes in our file as the court files come down and as he goes through the jail.

"Q What's a P-3?

"A It's the original piece of paper that you book someone in on.

"Q What information is contained on that?

"A Okay. The information that is contained on it is the man's name, his date of birth, his address, his next of kin and pertinent information about him and the small details of the arrest, the arrest warrant whether it was an on sight arrest or what type of arrest it was.

"Q Do you have that P-3 here?

"A I don't believe we do. It should be on the microfilm.

MR. LARSON: Which one is it?

[108] MR. SoRELLE: Your Honor, may we have the deposition?

THE COURT: Yes.

MR. SoRELLE: I'm sorry, Sheriff Tate's deposition.

MR. LARSON: While he is looking for that, Sheriff, I will ask you a few other questions.

"Q The Sheriff's Office had already taken a picture of this man on September 11, 1972?

THE COURT: Which man are we talking about, Leonard or Linnie?

MR. LARSON: Leonard McCollan.

"A Yes.

"Q That would have been in the folder too, wouldn't it, this photograph?

"A Right, but this folder that he is taking there is Linnie C. McCollan.

"Q It would have been in the Linnie C. McCollan —

"A It would be —

THE COURT: One at a time. Let him finish. Sheriff, you let him finish his question and Mr. Larson, let him finish his answer. Don't talk at the same time.

MR. LARSON: I'm sorry, Your Honor.

THE WITNESS: I apologize.

[109] "Q All right. So we make it perfectly clear, this photograph would have been in the file named Linnie McCollan in your office in September and October of 1972, is that right?

"A September, yes, Linnie Carl McCollan.

"Q And this same photograph would have stayed in that folder all the way up from that time to the present time?

"A Right.

"Q And for the record, I have been referring to Plaintiff's Exhibit Number Three, is that right?

"A Yes, sir.

"Q So, Sheriff, it would have been a rather simple thing to do if someone said that he wasn't the person that was wanted, it would have been a simple thing to pull the file and pull out the picture of the person in the file and see if it matched up with the real person, isn't that right?

"A As soon as it's processed and went all through it would have been.

"Q The very instant he came to jail it would have been simple, too, wouldn't it?

"A They would go through the normal process.

"Q Well —

"A It wouldn't be just a matter of him saying I have got the wrong man and that's it. In other words, he would have to be processed on through to see.

[110] "Q It's not important for you in your county to find out if you have got the right person or not?

"A Yes, that's the reason that it would be necessary for you to take the time and go through the process to make sure who you were talking to in jail if there was some doubt.

"Q Sheriff, it took you four days to figure out you had the wrong man.

"A There was four days elapsed, there, yes.

"Q It would have been a simple thing to just open up the file and look at the picture and you would have known instantaneously that you had the wrong person, right?

"A No, the picture alone wouldn't have done it.

"Q Why not?

"A You need to go through all of your file and you need to know who you were talking to, who you had in jail.

"Q Well, now, you're not telling the jury that Plaintiff's Exhibit Three looks like the man sitting over here, are you?

"A No.

"Q Well, what is it? I don't understand it. What is it that would have been so hard for you to have pulled out that photograph and looked at this man and said it wasn't the same person?

"A Okay. What we had to do or would have had to have done would be to pull the folder out and make sure by [111] fingerprints and everything that we had the correct picture in the file.

"Q Well, you had fingerprints, too, didn't you?

"A Yes, so it would be necessary for us to have, you know, both of them.

"Q Well, if you had pulled the file out and found the picture in there, you would have been kind of worried, you would have done some further checking immediately, isn't that right?

"A Yes, sir.

"Q But nobody did that in your jail, isn't that right, until four days later?

"A That's right.

"Q All right. Now, Sheriff, I believe your lawyers have found the forms.

"A Yes, sir.

"Q Is that what would have been in his folder?

"A Yes, sir, this is the P-3 and then here's your jail card.

"Q All right. Now, what you referred to as a P-3 and the things that would have been in the folder in October 1972, that's in front of you now?

"A Yes, sir.

"Q And that has been marked as Plaintiff's Exhibit what number?

[112] "Q Number Nine.

MR. LARSON: We offer Plaintiff's Exhibit Number Nine.

MR. SoRELLE: No objection.

MR. KNORPP: No objection.

THE COURT: It's admitted.

"Q All right. Sheriff, we have established that there would be Plaintiff's Exhibit Number Nine and Plaintiff's Exhibit Number Three in your folder?

"A Yes, sir.

"Q And then you said there is some fingerprints, right?

"A Yes, sir.

"Q And that would have been in the file, too?

"A Yes, sir.

"Q Do you have those?

"A Yeah, I think this would be another one of the exhibits.

"Q That would have been Plaintiff's Exhibit Number Four?

"A Yes, sir.

"Q So would anything else be in that file?

"A That would be all.

"Q Plaintiff's Exhibit Four, Plaintiff's Exhibit Nine and Plaintiff's Exhibit Three would have been in the file, is that right?

[113] "A Yes, sir.

"Q All right. Now, Sheriff, would you help me refresh my memory as to the sequence of events? You have a photograph dated September 11, 1972, is that right?

"A That's right.

"Q And that has been marked as Plaintiff's Exhibit what number?

"A Number Three.

"Q All right. Now, that photograph was made prior to the one that's down at the Amarillo City Police Department, is that right?

"A Yes.

"Q Now, that photograph was made when that man, Linnie McCollan, who we know to be Leonard McCollan, was placed in your jail?

"A That's right.

"Q Now, the fingerprints, were any fingerprints taken September 11th?

"A Yes.

"Q Are those the ones that you have up there in front of you?

"A Yes, Plaintiff's Exhibit Number Four.

"Q All right. Now, on September 11th that would have been also at the time when you would have taken the fingerprints or the FBI and Department of Public Safety, is that [114] right?

"A If he was arrested, if he was put in the Potter County Jail. I think once he was transferred over on the shoplifting

charge and arrested by the City of Amarillo. This is a copy of the prints.

"Q Well, now, somebody sent down to the Department of Public Safety for a rap sheet at some time or another?

"A That would be the City of Amarillo.

"Q What happened to the case that he was charged with in September, 1972, was he bonded out or what?

"A I don't know to my knowledge on this one.

"Q How do you know that's a transfer from the City?

"A On it there is no other paper work on it in my file and you wind up over here on this with just information only, you know, that you transferred from the City on it.

"Q What other information would be in it if it wasn't a transfer?

"A If it wasn't a transfer you would have your complete offense reports and everything.

"Q All right. Sheriff, at page thirty-seven of your deposition you testified thusly, when Leonard McCollan was arrested in Potter County and taken to your jail, he was fingerprinted and the fingerprint card was sent to the Department of Public Safety. You answered right. Question: Ordinarily they would classify them and send you back a rap [115] sheet. Answer: Yes. And the orders are very high. The department had gotten back a rap sheet. Answer: Yes. On Leonard McCollan it would have indicated he was using the wrong name, isn't that true. Answer: Yes. Question, so your department in all likelihood knew at the time that Linnie McCollan was arrested in Dallas County that Linnie McCollan was using an alias, giving you the wrong name,

isn't that true? Answer: Yes, my I. D. people. Question: Should have known. Answer: Yes.

Is that your testimony?

"A Yes, it was at the time.

"Q And now you're changing it?

"A No, sir. What I am saying is when we got back — yes, when we got back — yes, when we got back the rap sheet was in the file because it was a transfer. It should have been in the file. If it had been noted on there if it had been a sheriff's office arrest, but it was a transfer.

"Q Well, is the deposition in error?

"A No, sir. You asked me if he was arrested in Potter County in the deposition. If he was arrested in Potter County we should have a rap sheet, sent off for the rap sheet, but if it's the City of Amarillo, as I explained yesterday we only get the rap sheet, the one sent to us for the Dallas District Attorney or County Attorney, wherever the case is.

[116A]"Q Well, now, Sheriff, you testified yesterday, I believe, that this driver's license was taken up, this driver's license which we have entered into evidence marked Plaintiff's Exhibit Number Five?

"A Yes, sir.

"Q It was taken because the police officer took it up and determined that it was an illegally obtained driver's license, is that right?

"A Yes, sir.

"Q Well, now, Sheriff, I sent you some written interrogatories, do you know what I am talking about?

"A Yes, sir.

"Q And do you remember the answer to one of those questions I sent you? I asked you, have you, your attorneys, or any other person employed by you or your attorneys, inquired or have possession of the Texas driver's license which exhibits the Plaintiff's name, but does not contain the Plaintiff's photograph. You answered that one, yes. Then the question I asked you was if the answer to the previous question was affirmative, state the following: (a) the date the license was acquired and the name and address of the person who acquired the license. And you answered that the license in our possession acquired the seventh of October by Ed Porter, Potter County, Amarillo, Texas. Paragraph (b) I asked you to name the present address from which the license [117A] was acquired and you answered that the license was acquired Leonard McCollan, also known as Linnie C. McCollan who resided at 1940 Northwest Fourteenth, Amarillo, Texas. Defendant does not know the present address of Leonard McCollan. And then I asked you the reason why possession of it has been retained and you answered that the license was retained to establish the identity of a man who was charged with the sale of drugs in Amarillo, Texas.

Are those your answers?

"A Yes, sir.

"Q You signed that on April 8, 1975, under oath, is that right?

"A Yes, sir.

"Q Well, which is it? What you said yesterday or what you said here? Or is it both?

"A I don't understand your question.

"Q Well, yesterday you said it was taken up for another reason and today you say it was taken up to establish the identity in this interrogatory.

"A It was taken up for both. It is an altered driver's license to establish the identity of the man.

"Q Why didn't you tell me all of it when I asked you this question here in writing?

"A I don't know.

"Q Sheriff, now yesterday I believe you testified [118A] that Plaintiff's Exhibit Number Seven was the warrant that your deputies apparently carried down to Dallas, is that right?

"A Yes, sir.

"Q But it shows an execution on an unascertainable date because the names, I mean the dates have been marked out, is that right?

"A The dates have been marked out, yes, marked over.

"Q You didn't execute that, somebody on your behalf did?

"A Yes, sir.

"Q What's that man's name?

"A Price Adair.

MR. LARSON: Would you mark this as Plaintiff's Exhibit Number Ten?

(Plaintiff's Exhibit Number Ten marked for identification.)

MR. LARSON: Would you gentlemen like to inspect this before I show it to him?

MR. KNORPP: No objection.

MR. LARSON: Your Honor, this is a certified copy of an indictment out of the District Court of Amarillo, Texas, in Cause No. 15663-B, and it's styled the State of Texas Vs. Leonard McCollan, Jr. also known as Linnie McCollan. These are certified [116B] copies and at this time I would offer them into evidence.

THE COURT: What's the Exhibit number?

MR. LARSON: Ten, Your Honor.

THE COURT: It's admitted.

"Q All right, Sheriff, this warrant shows that it was executed on the 17th of January, 1973, at 2:55 o'clock p. m.?

"A Yes, sir.

"Q Pardon me, it came into the hand of the Sheriff on that date and it was executed on the twenty-first?

"A Right.

"Q Well, now, yesterday you testified that this warrant was also the one that you all served?

"A Yes, sir, this is the one that was in our files, this one here.

"Q Refer to that by exhibit number.

"A Number Seven, sir. This was the one that was in our file as the warrant for Leonard to be arrested on what we had.

"Q Okay. Well, you have another warrant there, was that executed on the same day or maybe the same days, explain to me why there is a difference.

"A Okay.

"Q I am referring now to the warrant in part of [117B] Plaintiff's Exhibit Ten.

"A This warrant in Plaintiff's Exhibit Ten is the original warrant for Leonard McCollan. This one is a bond forfeiture and bond withdrawal warrant in Plaintiff's Exhibit Number Seven. When he turned himself in, this came into the sheriff's office at that time, then this warrant was returned back to the Justice of the Peace where it was issued as him being arrested. This warrant was returned back to the district clerk to show that he was arrested.

"Q All right. Now this warrant that you said was the one that you all carried to Dallas marked Plaintiff's Exhibit Number Seven, it's been scratched out and they have '73 and '74 on there, and we don't know which is which, when it was filled out, but apparently somebody might have tried to fill it out in 1974, is that right?

"A This is the warrant, the one that we brought to Dallas to pick up Linnie. Okay, he was never taken before the Justice of the Peace. And what evidently the deputy does, I don't know to my knowledge, evidently he had filled it out partially but until he had taken him back before the magistrate where the warrant was issued he wouldn't have completed filing it and after Linnie was released, then it was put back into the file and not returned to that file until Leonard McCollan was arrested.

"Q Do you have any idea why he slipped and put 1974 [118B] on there?

"A Leonard was arrested in 1974 so he didn't —

"Q Well, wait a minute, this other warrant says he was arrested in 1973.

"A Okay, this warrant then is going to be the one that Leonard was arrested on the first time that he was brought into the office.

THE COURT: In other words, you say this warrant is the one —

THE WITNESS: This Exhibit Ten is going to be the one that was issued for him and he was brought into the office and released on bond.

"Q Sheriff, do you have any figures as to how many people were in your jail when Linnie McCollan, the Plaintiff in this case, was in your jail?

"A Approximately a hundred and fifty.

"Q And how much is your jail designed to hold?

"A Eighty-eight.

"Q You were pretty overcrowded, weren't you?

"A Yes, sir.

"Q Why is it that the bondsman — the bondsman is the one that paid Linnie's way back to Dallas, not you?

"A That's just an agreement with the bondsman. He said that he would pay it back to Dallas.

"Q What kind of an agreement?

[133] as Defendant's Exhibit Number Three, the third page and the fourth page are certified copies of Plaintiff's Exhibit Number Two, are they not?

"A Yes, sir.

"Q Can you tell me from the certified copy whether this bond was transferred on to a district court case from the numbers thereon?

"A Yes, sir. On top of the warrant here it shows 15663-B.

"Q Is that the number that you also found on the indictment that's contained in this exhibit?

"A Yes, sir.

"Q Is it fair to say in examining those documents, Sheriff, that the bond which was originally issued in the name of Linnie Carl McCollan and signed by Linnie Carl McCollan was used as the bond for the Justice of the Peace case, and then later it was transferred on to the indictment for Linnie Carl McCollan A/K/A Leonard McCollan?

"A Yes, sir.

"Q Sheriff, earlier, a question was put to you about no one checking the records in the I. D. Section until four days later. Why was there a delay in the checking of the I. D. files?

"A There was no one in I. D. during that time.

"Q Was it closed over the holiday period?

[136] Court or were they made up by your office?

"A They were made up by the J. P. Court.

MR. KNORPP: I will pass the witness.

RE-DIRECT EXAMINATION

BY MR. LARSON:

"Q Sheriff, when I took your deposition on January the twenty-fifth or twenty-fourth of this year, I believe, you had

all the same records that you will have here in Court today, is that right?

"A Yes, sir.

"Q And you had access to all of the same records back in January that you do now in November, is that right?

"A Restate it, you lost me.

"Q There is not any more records, you haven't discovered any more records between now, this date, and last January, have you?

"A Not after the deposition was taken.

"Q So at the deposition you had all of the same records that you have before you right here in Court, is that right?

"A Yes, sir, these records that I have here is what I had in my files.

"Q All right. So when you gave your deposition, you were talking about the same records that you're talking about here in Court today, is that right?

[137] "A Yes, sir.

"Q And you were referring to and had access to during your deposition all of these records that are out in front of you, isn't that true?

"A Yes, sir, I had these in front of me.

"Q Sheriff, will you agree with me that the name Joe Smith is a pretty common name?

"A Yes, sir.

"Q It's real common, isn't it?

"A Yes, sir.

"Q All right. Well, now, if a J. P. out in Potter County issued a warrant for a man named Joe Smith, that doesn't give you the right to arrest every Joe Smith in the United States, does it?

THE COURT: Counsel, don't argue the case. I am going to give you time to argue. This is arguing. There is no use to argue with the witness. I don't know whether you all are trying to get the last word with the witness or not, but let's get on with this case.

MR. LARSON: Well, I am just responding, Your Honor, to something that he said on Direct and I apologize.

THE COURT: That's what I am getting at. Both sides seem to want to get the last word. Now, we have [138] milked this subject dry as far as the Sheriff is concerned. I will let all of you argue the case to the jury.

"Q Does the Constitution of the United States take a vacation over the holidays in Potter County?

MR. KNORPP: Objection, Your Honor.

THE COURT: I sustain the objection. That's argumentative, Counsel. There is no use to ask the Sheriff that, it's a question of law, and I will instruct the jury as to the law.

MR. LARSON: All right. I will withdraw any further questions, Your Honor.

THE COURT: All right. Let's take a fifteen minute recess, ladies and gentlemen.

(Recess.)

MR. LARSON: Your Honor, I will call as my next witness, Mr. Tate.

GARY TATE,

called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LARSON:

"Q Would you state your name for the jury, please, sir?

"A Gary R. Tate.

"Q And Mr. Tate, how are you presently employed?

[139] "A I'm a patrolman with the Dallas Police Department.

"Q How were you employed in December, 1972?

"A With the Dallas Police Department.

"Q So you have been a policeman for how long?

"A Five and a half years.

"Q What area or section of the City were you assigned to in December, December 26th, 1972?

"A The southeast district.

"Q All right, on that day did you have an occasion to come into contact with the Plaintiff in this lawsuit, Linnie McCollan?

"A Yes, sir.

"Q Would you tell us where and under what circumstances that occurred?

"A At the intersection of Scyene Road and Second Avenue. I pulled in behind Mr. McCollan who was parked at the red light facing north. The intersection light was red but

the lights for the southbound lane turned green for the drivers northbound and as traffic started moving south in the southbound lane, Mr. McCollan proceeded through the red light. And at that time I proceeded through behind him and stopped him.

"Q What kind of a vehicle was Mr. McCollan driving?

"A He was driving a station wagon, I can't tell you the make or model right now.

[140] "Q Was there anything particularly noticeable about the wagon? Did it have an insignia or anything on it?

"A It was a security service car.

"Q All right. I assume from what you have just testified to you were stopping Mr. McCollan because he ran a red light, is that right?

"A Yes, sir.

"Q How did you effectuate the stop?

"A I turned on my red lights on my marked vehicle, walked up to the car and told Mr. McCollan that I had stopped him for running a red light and asked him for his driver's license.

"Q Did he immediately stop or did he delay?

"A Yes, sir, he immediately stopped.

"Q Did he give you his driver's license?

"A Yes, sir, he did.

"Q That's where you learned his name? Is that right?

"A Yes, sir.

"Q What did you do then?

"A I went back to my vehicle and as a routine matter I ran a check on the license plates and on Mr. McCollan.

"Q All right. Now, the jury can't hear you and I can hardly hear you, would you please tell the jury what you heard over the radio or what did you learn as the result of the radio call?

[141] "A Sir?

"Q As the result of your radio call, what did you learn?

"A That there was a warrant in effect for Mr. McCollan at the time.

"Q All right. And what did you do in response to that?

"A I informed Mr. McCollan that they did have a warrant out for him that had been confirmed and that I would have to take him to jail.

"Q All right. Well, now, I assume you did that after you got off of your radio call, is that right?

"A Yes, sir.

"Q All right. When you confronted the Plaintiff with the information about the warrant, what, if anything, did he say?

"A He told me it wasn't him.

"Q Anything else?

"A Well, the information I received was that the warrant was out of Potter County, Amarillo, and I asked Mr. McCollan if he had been in Amarillo and he said that he had lived there at one time. I asked him again if he had been there in the last year and he said, yes, he had.

"Q All right. Then, you had him get out of your car or get out of his car?

[142] "A I had him get out of his car and had him seated in mine.

"Q Did you handcuff him?

"A I don't remember.

"Q Where did you take him then?

"A I took him t the southeast substation on Bexar Street.

"Q That has a lockup facility or jail, is that right?

"A Yes, sir.

"Q Did you place him in that facility?

"A Yes, sir, I did.

"Q All right. Now, did you do anything else to verify the fact of whether or not there was a warrant for this man?

"A Yes, sir. I had my supervisor, who is the desk sergeant at southeast, call Amarillo.

"Q You didn't make the call but were you present when it was done?

"A Yes, sir.

"Q All right. So as a result of that phone call you left him in jail, I take it, is that right?

"A Yes, sir.

MR. LARSON: Your witness.

CROSS-EXAMINATION

BY MR. KNORPP:

[143/ "Q Mr. Tate, what information would you ordinarily put in to request a check on somebody to see whether they are wanted or not when you are out in the field?

"A It would be the last name, the first name, the race, the sex and the birth date.

"Q All right. In this particular case did you secure the Plaintiff's birth date from his driver's license?

"A Yes, sir.

"Q And did you have occasion to fill out a report by hand when you brought this subject in?

"A Yes, sir. You mean the arrest sheet?

"Q Yes, sir. Let me hand you Defendant's Exhibit Number Four which is a photocopy of the microfilm, can you recognize that?

"A Yes, sir.

"Q Does this appear to be in your own handwriting?

"A Yes, sir.

"Q That is the arrest sheet you filed in this particular case?

"A Yes, sir.

"Q Does it indicate anywhere on there the Texas Driver's License number, the number of the license that was displayed by the Plaintiff?

"A Yes, sir, it does.

"Q What is that driver's license number?

[144] "A Excuse me, I am sorry, sir. I was looking at the wrong blank. No, sir, it does not.

"Q Do you book any property under the Texas Driver's License number if they have one?

"A There's the number. I might have put it in the wrong blank. That looks like it. I have got it marked Texas.

"Q Would that be the driver's license number?

"A Yes, sir, it appears to be.

MR. KNORPP: I will tender Defendant's Exhibit Number Four.

MR. LARSON: No objection.

THE COURT: It's admitted.

"Q Do you ever use a driver's license number when you are checking or do you just generally use the name and date of birth and other characteristics that you described?

"A If we come back with a "hit" and the information on the computer has a license number then I will use it.

"Q I see. But on Mr. McCollan's case there was no license number listed?

MR. LARSON: Pass the witness, Your Honor.

MR. SoRELLE: I have no questions, Your Honor.

THE COURT: Is that all?

MR. LARSON: Just a few more questions.

RE-DIRECT EXAMINATION

[145] BY MR. LARSON:

"Q Did the Plaintiff tell you more than once that he wasn't the person that was wanted?

"A Yes, sir. Several times.

"Q All right. Is it ordinary procedure for you to make this phone call after someone is arrested on an out of county warrant?

"A Well, sir, yes. On all county warrants the normal procedure is to make the phone call to verify it with the county that has the warrant.

"Q All right. Now, this information you have here on your arrest sheet has been entered into evidence on warrant number 8762 from Judge Roberts, and I can't read your writing.

"A Court.

"Q Oh, Judge Roberts' court?

"A Yes, sir.

"Q Per Chief Deputy McCarty.

"A Yes.

"Q Was this information that you got from someone or how did you get that information?

"A That information on the warrant number and the court and the deputy chief came through my supervisor who made the phone call.

MR. LARSON: That's all. Thank you.

[146] MR. KNORPP: That's all.

MR. SoRELLE: I have no questions.

THE COURT: You're excused as a witness, Mr. Tate.

Call your next witness.

MR. LARSON: I will call the Plaintiff, Your Honor, Linnie McCollan.

LINNIE CARL McCOLLAN,

the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LARSON:

"Q State your name to the jury, please.

"A Linnie Carl McCollan.

"Q Mr. McCollan, you're going to have to speak up or put that microphone up so we can hear you.

"A Linnie Carl McCollan.

"Q When were you born?

"A December 8, 1949.

"Q Do you have any brothers and sisters?

"A Yes, sir.

"Q How many?

"A I have one brother and two more sisters.

"Q What's your brother's name?

"A Leonard McCollan.

"Q And is he older or younger than you?

"A He's the oldest.

[147] "Q All right. I'm going to show you what has been previously entered into evidence as Plaintiff's Exhibit Number Three and Plaintiff's Exhibit Number Two and I will ask you to tell us whether or not that's your brother?

"A Yes, sir.

"Q About how many years older is he than you?

"A Six.

"Q Do you know his birth date?

"A No, sir, I don't.

"Q Were you raised in Dallas or where?

"A I was raised in West Texas.

"Q Well, give us the towns, if you would, or cities.

"A I was born in Amarillo, Texas, and I was raised in Lubbock, Texas.

"Q Now, there has been entered into evidence previously here a driver's license that has been previously marked as Plaintiff's Exhibit Number Five, do you see what I am talking about?

"A Yes, sir.

"Q Now, that driver's license has your name on it, is that right?

"A Yes, sir.

"Q And whose picture is that?

"A That's my brother's picture.

"Q Did you in any way help him get that driver's [148] license?

"A No, no, I know nothing about it at all.

"Q You didn't give him that driver's license?

"A No.

"Q Did you help him get it?

"A No, sir.

"Q Do you have any idea how he got that?

"A No, I don't.

"Q All right. Now, do you remember December 26th, 1972?

"A Yes, sir.

"Q All right, who were you working for at that time?

"A Purolator Service as a mail messenger.

"Q What kind of work was that?

"A It's affiliated with Armored Motor Company where you pick up and deliver money and different important papers and stuff like that.

"Q You just heard the officer testify here, Officer Tate, is that right?

"A Yes, sir.

"Q About the traffic ticket?

"A Yes, sir.

"Q Do you remember that?

"A Yes, sir.

"Q And were you on duty at the time this traffic [149] ticket was given you?

"A Yes, sir. I was working.

"Q All right. What is your rate of pay and the hours that you were working?

"A I was making two fifty an hour and I was working straight time, ten hours a day, I believe, forty five hours a week, I believe.

"Q All right. Now, this was a Tuesday that you were arrested on, is that right?

"A Uh huh.

"Q Would you have worked, had this not happened the rest of that week?

"A Yes, sir.

"Q Do you work on Saturdays?

"A Yeah, uh huh.

"Q How many hours did you usually work on Saturdays?

"A Ten, I believe.

"Q And would you have worked the following week?

"A Yes, sir.

"Q What time — after you got out of jail in Potter County, when did you get to go back to work?

"A I don't — it was the next week, I believe.

"Q So, in other words, you missed almost two weeks of work?

"A Yes, sir.

[150] "Q As a result of the arrest and incarceration in Potter County, is that right?

"A Yes, sir.

"Q Now, did this officer give you a traffic citation?

"A Yeah, uh huh.

"Q All right. Then what did he do?

"A Well, he told me he was going to write me ticket for running a red light and I could appear in court on a certain date and I signed the traffic ticket. And then the call came back on his radio that I was wanted, you know, in Potter County, and so he told me he was going to have to take me to jail. I told him I hadn't been to Potter County for a year or two, so, you know, he said it was still his job to, you know, take me in. I kept telling him I wasn't the right person. I didn't know who they were looking for but I wasn't the right man. Finally, he told me to shut up about it and he was going to take me to jail and I shut up and so he just did that.

"Q Describe the facility you were put in at first.

"A It was a substation, it was one big — one big cell that I was placed in. This was just a big day room kind of cell with bars around it.

"Q How long did you stay there?

"A I stayed there until late that afternoon.

"Q Then where did you go?

[151] "A They transferred me to the downtown City Jail.

"Q All right. Describe the facility that you were in downtown in the City of Dallas.

"A I was in a small cell, smaller cell than the one that I was originally in and it had, I think, about three or four bunks in each one and I was in one of those.

"Q How long did you stay in the jail in the downtown part of Dallas?

"A Until approximately or until about December thirty I believe.

"Q What happened on December 30th?

"A Two men from Amarillo came down about five thirty that morning and woke me up. Well, the City woke me up and they called me down and out and then they came and said they came to get me to take me back to Amarillo. He had a talk with me first.

"Q What did he tell you?

"A He told me that he was with the sheriff's department and he came down to take me back to Amarillo and I was going to go peaceful or either he — if I tried to run or tried to escape or anything like this, he was going to definitely

shoot me and that was it, you know, he told me he was going to take me dead or alive back with him. I told him I wouldn't give him no trouble because I wasn't the man that he was looking for. I kept telling him that over and over [152] and over. By the time we got to Amarillo, he was convinced that I wasn't the one, he knew —

MR. KNORPP: Your Honor, I would have to object to this voluntary opinion, there is not any evidence on that, that's highly objectionable.

THE COURT: I sustain the objection and instruct the jury not to consider it.

"Q Mr. McCollan, it's the law that you are not allowed to give your opinion as to what you felt that someone else thought so I would appreciate it if you would refrain from doing that.

"A Yes, sir.

"Q Do you understand?

"A Yes, sir.

"Q All right. Now, you told the deputies from Potter County you weren't the one, is that right?

"A It was just one deputy.

"Q Just one?

"A Yes, sir.

"Q All right. Now, did one or two people take you in a vehicle up there?

"A Two.

"Q What kind of a vehicle was it?

"A It was a sheriff's department police car, it was a station wagon with a jail made inside of it.

[153] "Q What kind of jail? What did it look like?

"A Well, the front seat was divided off from me. I was sitting behind and it was a steel rack between us. There was no way you could get out, you know, from where I was at.

"Q All right. Now, did they have you restrained in any other way?

"A Yes, sir. They had handcuffs on my hands.

"Q Were your hands in front of you or in back?

"A No, they was in the back and they had a chain running down to my leg with cuffs on my legs, you know, a chain on my legs to my arms, to my wrist.

"Q All right. Now, from the time they left Dallas until they arrived in Amarillo did they ever stop the car?

"A Yes, sir, they stopped.

"Q Where?

"A They stopped to fill up. They stopped at a service station to fill up. Then they made another stop, I believe in Wichita Falls to eat.

"Q Did they give you anything to eat?

"A No, sir.

"Q Where did they leave you while they were eating?

"A They parked outside the building right in front of the window and left me in the car. They ate and they told me that I would eat when I got to Amarillo.

"Q All right. Now, about what time did you get to [154] Amarillo?

"A It was about two thirty, approximately three o'clock in the afternoon.

"Q How were you dressed at this time?

"A I just had my work clothes on and I had a little thin jacket, it wasn't that cold. It was kind of cold but it wasn't that cold, not here.

"Q Did the City of Dallas give you any clothes to wear while you were in the jail there?

"A No, sir.

"Q So you had the same clothes on you had on when you were arrested?

"A Yes, sir.

"Q On the 26th, is that right?

"A Yes, sir.

"Q All right. Now, what did they do to you when they got you to Amarillo? Did they put you in jail or what?

"A Yes, sir, they put me in jail.

"Q Did they take your fingerprints or a photograph of you?

"A Not then, no.

"Q Did they ever?

"A Just before I got ready to be released they took my thumb print, I believe.

"Q All right. And how long did you stay in the jail [155] up there before they let you loose?

"A It was after New Year's, it was the second, I think, the second of January.

"Q About what time on the second of January did they let you loose?

"A It was late in the afternoon, almost night, almost dark.

"Q Where did they take you when they let you loose?

"A They took me to the bondsman, the bondsman took me to the bus station and bought me a ticket. And then they took me back over to this cafe and gave me a drink and then they took me over to this friend girl's house and dropped me off.

"Q All right. When did you get on the bus?

"A The next day. The next morning she took me to the bus station.

"Q Did the Sheriff or of his deputies tell you what happened when they got you down out of the jail?

"A I told them what happened.

"Q What do you mean? Tell us what happened.

"A Well, I was telling everybody that was in the same tank with me that I wasn't the guy, you know, I hadn't been in Amarillo. So there was this special fellow there, he was from Mexico or he was over the cell, he was something like the cell boss and he said, "yeah, they —

[156] MR. KNORPP: I am going to object to what he said on the grounds of heresay.

THE COURT: I sustain the objection.

"Q Mr. McCollan, you can't testify as to what someone else said. Go on and tell your story.

THE COURT: Well, he can testify to any conversation he had with the deputy sheriff.

MR. LARSON: I understand, Your Honor, and I was about to explain that to him.

"Q You can tell what conversations you had with deputy sheriffs —

THE COURT: Suppose you just ask questions, Mr. Larson, and I will instruct the witness and I will sustain the objections and overrule them. You just ask questions.

MR. LARSON: All right, Sir.

"Q Go ahead, Mr. McCollan, answer.

"A Well —

THE COURT: What are you asking him?

MR. LARSON: I had asked him what conversations he had with the deputies and the sheriff just before he was released.

"A Well, this Johnny Carter came in and this friend girl came down and brought this man over to look at me. And after he found out I wasn't the one, he said, no, he definitely [157] is not the man. And he said, just hold on, you know, a couple of minutes and I will talk to the sheriff and we will have you out of here pretty soon. There was another sheriff with him, a black man. And they looked me over and went down. In about two hours — in about an hour or two hours later they came back up and called me down and out.

"Q Did you go down and visit the sheriff?

"A Yes, sir.

"Q Did you have any discussions with him?

"A Yes, sir.

"Q What did the sheriff tell you?

"A He told me he certainly didn't want to lock the wrong man up. I said I had been telling them all the time I wasn't the one. So he showed me this driver's license and said, that's the fellow were looking for. Well, I said that's my brother, you know. He asked me where he was and I had

no idea, I hadn't saw him. So he told me or he asked me did I have any money and I told him no. He said well, don't worry about it, and if you need a reference or something back home on your job, just give me a call collect and I will tell them. Just give me a call collect and I will straighten this up.

"Q Was there any other conversation or discussion with the sheriff?

"A Well, they asked me to sign out a release or [158] something but I didn't do it.

"Q Did they explain to you what the release was?

"A No. One man told me it was for my property but I didn't have anything but this coat, but my jacket, I didn't know what it was.

"Q All right. Now you were present in Court, were you not, when the Sheriff drew the diagram of the jail?

"A Yes, sir.

"Q Would you step down beside the diagram, please?

"A Yes.

"Q Now, is this — do you remember what floor you were on to begin with?

"A No.

"Q Do you believe this to be an accurate representation of where you were?

"A Well, I know there was — I know across from me there was another cell, you know, I believe it was the Federal tank or something.

"Q Draw that on there if you would.

"A It was something like that.

"Q Put it in there.

"A Like so.

"Q Now, you have just marked a place on here where there is a door, is that right?

"A Yes, sir.

[180] "Q And I'm going to read what it says over your signature here, "This is to certify that I am the person named and described on the reverse side and that my license or driving privilege is not currently suspended, or revoked, cancelled or denied. I further certify that my license has not expired and that I am eligible for a duplicate." And you signed it "Linnie McCollan"?

"A Yes, sir.

"Q In fact, the front of that was not correct, was it?

"A Yes, sir, it was correct to my knowedge.

"Q The birth date is 12-8-48.

"A Well, like I said, that lady filled that out. I didn't know that was what was originally on my driver's license.

"Q I understand, Mr. McCollan, but you have a number of applications here and each time you signed the back certifying that the information was correct, did you not?

"A Well, yes, sir.

"Q And you always knew that your birth date wasn't 12-8-48?

"A It was 12-8-49.

"Q Right. And you also knew on at least two occasions that the address was not correct?

"A The address was correct on both.

(JURY OUT.)

[182] THE COURT: All right. Gentlement, now that the jury has retired or taking a recess, go ahead.

"Q (By Mr. SoRelle) Mr. McCollan, you were charged, were you not, with violating the laws of the State of Texas in making false applications for duplicate driver's license relating to the obtaining of these duplicates, were you not?

"A I believe it was entering a false statement for having a Texas driver's license.

"Q Right. that you had made false statements when you signed those, and you stated that your license was not suspended or revoked.

"A Well, see, at the time when I got those, I didn't know anything about my driver's license had been suspended. They later sent me a letter at the same time they sent me a deal from down at the County showing that I owed a fine, I believe of fifty-eight dollars and something and I paid it. And then they sent me another fine and I paid that and later they sent me my money back. I got a check for some of it back.

"Q Mr. McCollan, didn't you in fact plead guilty to these charges of making false statements on your application for duplicate driver's licenses?

"A I didn't go to Court.

"Q Did you not go in and enter a guilty plea when you

[189] "Q What name does it have on it?

"A Linnie Carl McCollan.

"Q All right. And what is your date of birth shown as?

"A 12-8-48.

"Q Would you state or just read the Texas driver's license number that's on there?

"A It's 7842417.

"Q Was that the driver's license that you held in 1972?

"A No, sir.

"Q All right. Do you still have the driver's license you had at that time?

"A No, sir. Those are the ones that I lost.

"Q All right. You had previously, when I took your deposition, another driver's license that was in the possession of your Counsel?

"A That was the duplicate.

"Q That was a duplicate?

"A Yes, sir.

"Q Mr. McCollan, is this a driver's license that you have previously held?

"A Yes, sir.

"Q I will hand you what has been marked as Defendant's Exhibit Number Thirteen and I will ask you if this was your [190] driver's license with your picture on it?

"A Yes, sir.

"Q Is that your signature on that driver's license?

"A Yes, sir.

"Q And what period of time did that license cover? Do you know?

"A Until 1974.

"Q Do you know when you received it?

"A No, sir, I don't. This was when I got my commercial license.

"Q This is a commercial operator's license?

"A Yes, sir.

"Q And I believe your prior testimony, if I am not mistaken, was that you got that license some time in 1973, is that correct?

"A I think so.

"Q And was that when you were going to work for Gay's Delivery Service?

"A I believe so.

"Q Is that what you recall?

"A Yes, sir.

"Q You would have gotten that at that time and all of these other exhibits that I showed you previously you also identified as having your signature on them, is that correct?

"A Yes, sir.

[191] "Q Mr. McCollan, when you were arrested by the Dallas police in December of 1972 and placed in jail, was that your first experience in being in jail?

"A No, sir.

"Q How many times had you been in jail before?

"A I don't know the exact number.

"Q Had you ever been in the Dallas jail before?

"A Yes, sir.

"Q Had you ever spent any lengthy time in jail?

"A The Dallas City Jail?

"Q Yes.

"A No, sir.

"Q Had you ever spent any lengthy time in any other jail?

"A Yes, sir. In the County Jail.

"Q How long had you been there?

"A I think sixty days, I think, I stayed one time.

"Q And had you also been in jail in any other cities?

"A In my home town in Lubbock.

"Q I see. And had you spent any particular length of time in jail at that time?

"A No, sir.

"Q So you had been in jail in Lubbock and, I take it, the Dallas City Jail and the Dallas County Jail?

"A Yes, sir.

[192] "Q All right. And the length of time was, I am sorry, thirty days or sixty days, what did you say?

"A I believe about sixty days, I'm not sure.

"Q About sixty days?

"A Yes, sir.

"Q All right. Mr. McCollan, I hand you what has been marked as Defendant's Exhibit Number Fourteen, it appears

to be another duplicate license application. This one carries the date, I believe, of March 9th, 1972, and I will ask you if that is your signature on that exhibit?

"A No, sir.

"Q Is the other information on the exhibit consistent with your other applications for license, is it the same driver's license number and date of birth and name?

"A I believe so.

"Q Does that application or the signature on it appear to be the same as Defendant's Exhibit Number Five if you exclude the photograph?

"A Yes.

"Q And whose picture did you say was on Plaintiff's Exhibit Number Five?

"A My brother's, that's my brother's picture.

MR. LARSON: Excuse me, Your Honor, for the record he referred to that as Defendant's Exhibit Number Five and I want to be sure that the record is clear that [193] that's Plaintiff's Exhibit Number Five.

MR. SoRELLE: When I said Defendant's Exhibit Number Five, I was speaking of Plaintiff's Exhibit Number Five.

THE COURT: All right.

"Q Do you know if that is your brother's signature?

"A I think so, it looks like it, I'm not certain.

MR. SoRELLE: I would like to offer into evidence Defendant's Exhibit Number Fourteen.

MR. LARSON: No objection.

THE COURT: It's admitted.

"Q Mr. McCollan, your brother or there is evidence that your brother had that driver's license at one time, I believe you heard the evidence. Now, you also have stated that you may have been in Amarillo around March of 1972, is it possible that you gave your brother the information that is on your driver's license such as your date of birth?

"A No, sir, no way.

"Q Can you think of any way your brother got the information that you were listing your date of birth as December 8, 1948?

"A No, sir.

"Q Your brother wouldn't have any reason to pick that date unless he obtained it from you or from your driver's license, would he?

[194] "A I don't guess so.

"Q Because that's not your birth date, is it?

"A No, sir.

"Q Even though to this day your driver's license reflects that date?

"A. Yes, sir.

"Q You have never attempted to change that?

"A No.

"Q Mr. McCollan, have you ever been convicted of a crime for which you could receive punishment in excess of one year?

"A Yes, sir.

"Q What was the crime involved?

"A Marijuana.

"Q Was it for selling marijuana?

"A Yes, sir.

"Q And you were convicted in what court?

"A I don't remember the court.

"Q Where was it?

"A It's in Dallas.

"Q And did you receive a sentence for that?

"A Yes, sir. I received probation.

"Q How many years?

"A Seven.

"Q Have you been convicted of any crimes for which [195] you could be punished in excess of one year?

"A Not that I can think of. No, I haven't.

"Q Mr. McCollan, have you ever been fined or convicted of any type of an offense for giving a false statement?

"A Those licenses that you are talking about a while ago, I paid a fine of fifty-two fifty.

"Q And the fine that you paid on that was based on making a false statement, was it not?

"A Yes, sir.

"Q Mr. McCollan, I believe you stated or correct me if I am wrong, that the only time you ever saw Sheriff Baker was at the time he released you from jail, is that correct?

"A Yes, sir.

"Q And Sheriff Baker was the one that determined to release you, was he not?

"A I believe it was Johnny Carter, the bondsman, the bail bondsman.

"Q Well, Johnny Carter came in and got you, didn't he?

"A Yes, sir.

"Q And Sheriff Baker made the decision that you could go?

"A Yes, sir.

"Q And explained to you how it occurred and why there was a warrant for you, did he not?

[196] "A No, sir.

"Q Now, didn't he show you the driver's license?

"A Yes, sir.

"Q And say here's how we determined to issue a warrant for Linnie Carl McCollan?

"A He asked me who it was on that picture.

THE COURT: A little louder, please.

"A He told me who he was looking for, the guy on the picture, that he's the one responsible for me being arrested, you know.

"Q I see. And that it was your brother that had been using your name, your birth date, and displaying this to other people, is that correct?

"A Yes, sir.

"Q Do you recall if you were in Amarillo during August of 1972?

"A No, sir.

"Q You don't know whether you were or weren't, is that correct?

"A Right.

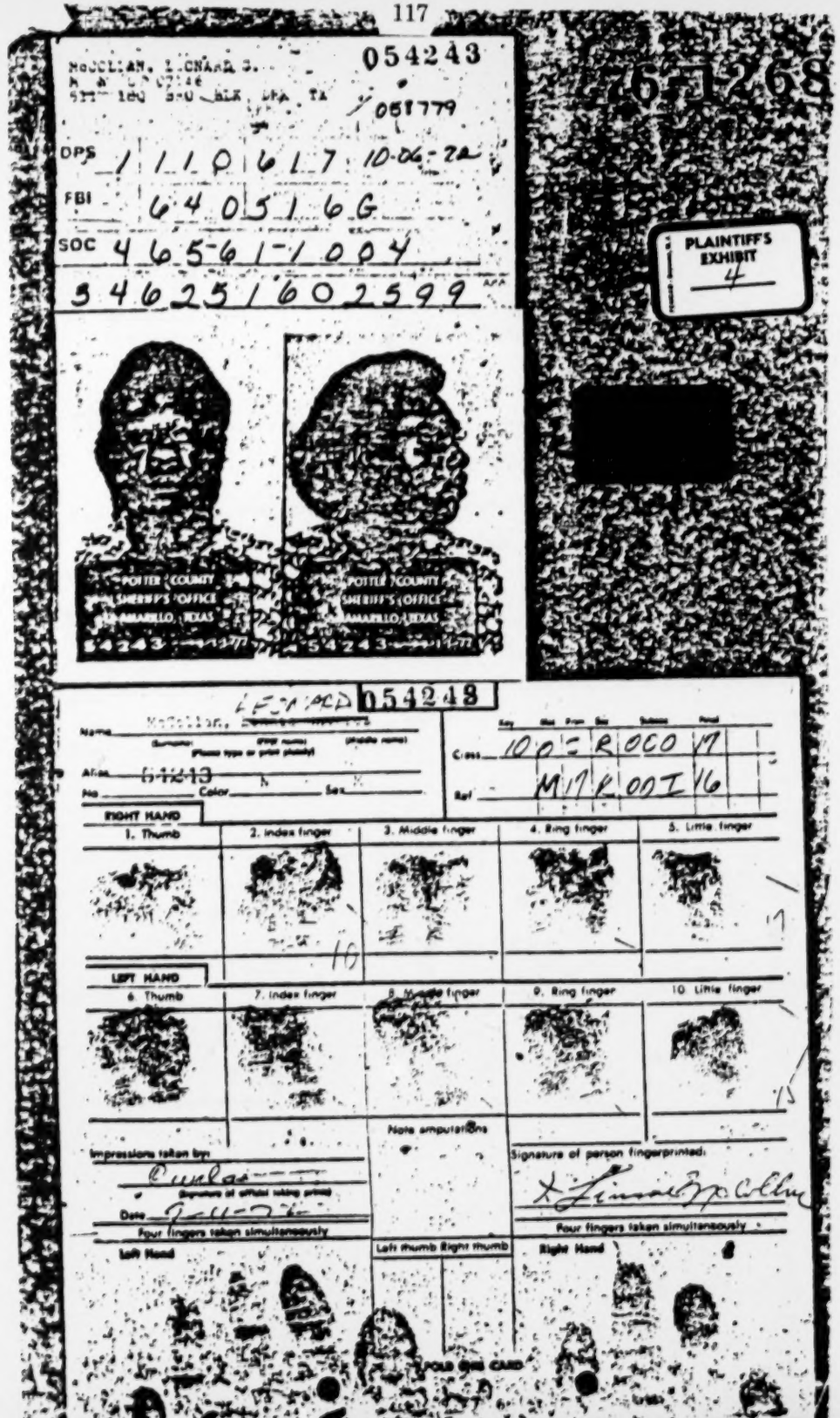
"Q Do you recall receiving a traffic ticket at that time?

"A No.

"Q All right. Mr. McCollan, you reviewed your income tax returns earlier. Now, is the income reflected on those

PLAINTIFF'S EXHIBIT 2

PLAINTIFF'S EXHIBIT 3



[redacted]

76-1268

WARRANT OF ARREST OR CAPIAS

RECEIVED
at 2:00 o'clock P M
NOV 3 1972
POTTER COUNTY, TEXAS
SHERIFF'S OFFICE
BY _____ DEPUTY

THE STATE OF TEXAS

To the Sheriff or Any Constable of Potter County, Said State—GREETINGS:

You are Commanded to take the body of LINNIE CARL McCOLLAN

and bring him before me at my office in Amarillo, in said County, on the instanter, then and there to answer the STATE OF TEXAS, for an offense against the laws of said state, to-wit: SALE OF NARCOTICS

AFFIDAVIT FILED BY JOHNNIE CARTER TO BE RELEASED AS SURETY ON BOND

of which offense he is accused by the written Complaint under oath of JOHNNIE CARTER

filed before me.

HEREIN FAIL NOT but have you then and there, before me, this writ with your return endorsed thereon, showing how you have executed the same.

Witness my signature on this, the 3rd day of November 1972

C E Roberts

Justice of Peace, Precinct No. One, Potter County, Texas

C. L. Roberts

PLAINTIFF'S EXHIBIT 7

OFFICER'S RETURN

Came to hand 31st day of Dec A. D. 19 73 and executed the 21st day of January A. D., 19 74 by arresting the within named defendant and bringing him before the Courts as herein commanded.

Lennie Earl McCollan

T. L. Bales Sheriff
Potter County
By Paul Hunt Deputy

$0 dee 2m

File No. 8762

IN JUSTICE COURT
WARRANT OF ARREST

THE STATE OF TEXAS
Vs.
Lennie Earl McCollan aka
LINNIE EARL McCOLLAN aka

Issued the 3rd day of November A. D. 1972
C. C. Roberts
Justice of the Peace

Filed the 3rd day of Jan A. D. 1974
C. C. Roberts
Justice of the Peace

JAN 28 1974

McCOLLAN LINNIE O. 54243 8762
516 W. 2 #11 AMA TEX AMA TEX 12/8/48
W M 24 5-11 180 BLK BRN DRK MED NONE
LABOR POTTER AFD
10/6/72 4:30PM SALE OF MARC DRUG DIST

FACTS OF ARREST (EXPLAIN IN DETAIL)
SOC SEC # 465-61-1004
SELECTIVE SVC #
ARMED SERVICE BRANCH
AND SERIAL #
OTHER IDENTIFIABLE #
DRIVERS LICENSE #
AND STATE ISSUED

SUB TRANS THIS DATE ON W/8762 BOND 10,000 OR 1,000 CASH

OTHER SIDE FOR FURTHER REMARKS

Date Oct. 10th 19 72

COUNTY JAILER:
Kindly release from custody, so far as this office is concerned.
Lynnie McCollan 8762 Sale of NARCOTIC
Name Warrant No. Offense
For reasons indicated below Remarks
Paid on Fine Amt
Jail Credit Amt
Number of days served
Case dismissed by
Grand Jury No Bill
Released to
by authority of
On 5,000 Bond
SOUL CITY BOND CO.
JOE R. LYNN
By LONNIE CARR
Paul Hunt Sheriff
By Deputy

PERMISSION TO CENSOR MAIL 54213

I, _____ DO HEREBY GRANT THE SHERIFF OF POTTER COUNTY PERMISSION TO OPEN AND READ ALL INCOMING AND OUTGOING MAIL, EITHER WRITTEN BY ME OR ADDRESSED TO ME.

Date _____

SIGNED Lennie McCollan

PLAINTIFF'S EXHIBIT 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-752

T. L. BAKER,

Petitioner

V.

LINNIE CARL McCOLLAN,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 53, paragraph 1, of the Rules of this Court, motion is hereby made that respondent be allowed to proceed in forma pauperis. Respondent's affidavit is attached to this motion.

Motion is also hereby made, on the basis of the annexed affidavit of Linnie Carl McCollan, respondent in this case, for leave to dispense with the printing of the brief in opposition to the application for certiorari.

Douglas R. Larson
JOHNSTON & LARSON
Suite 1002, Texas Building
810 Main Street
Dallas, Texas 75202
(214) 742-3847
(214) 741-2958

Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing motion was served upon the petitioner by placing a copy of the same in the United States mail, first class, postage prepaid and properly addressed, this 5th day of December, 1978, to the following:

A. W. SoRelle, III, Attorney at Law
P. O. Box 9158
Amarillo, Texas 79105

Douglas R. Larson

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-752

T. L. BAKER,

Petitioner

V.

LINNIE CARL McCOLLAN,

Respondent

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

STATE OF TEXAS)
)
COUNTY OF DALLAS)

I, LINNIE CARL McCOLLAN, being first duly sworn according to law, depose and say that I am the respondent in the above-entitled cause, and, in support of my application for leave to proceed without being required to prepay costs or fees, state:

1. Because of my poverty I am unable to pay the costs of said cause.

2. I am unable to give security for the same.

3. I believe that I am entitled to the redress I seek in said cause.

4. I was granted leave to proceed in forma pauperis in the Fifth Circuit. I seek to have the Court

deny the petitioner's application for certiorari and I cannot proceed and be properly represented unless I am not required to pay the costs or give security therefor.

Linnie Carl McCollan

Linnie Carl McCollan

SUBSCRIBED AND SWORN TO BEFORE ME, by the said LINNIE CARL McCOLLAN, this 5th day of December, 1978, to certify which witness my hand and seal of office.

J. Marshall
NOTARY PUBLIC in and for DALLAS COUNTY and THE STATE OF TEXAS

My commission expires December 31, 1980.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-752

T. L. BAKER,

Petitioner

V.

LINNIE CARL McCOLLAN,

Respondent

BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

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NO. 78-752

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Respondent

BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The respondent, Linnie Carl McCollan, plaintiff in the trial court requests the Court to deny the petitioner's application for a writ of certiorari and hereby submits this brief in opposition to said application.

MEMORANDUM FOR RESPONDENT

Respondent adopts, for purposes of this memorandum, the material in the petitioner's petition under the headings, "Opinion Below," "Jurisdiction," "Questions Presented," and "Constitutional and Statutory Provisions Involved."

STATEMENT OF THE CASE

Respondent adopts the petitioner's statement of the case, but because petitioner's statement of the case does not completely state the facts for a proper determination of this application for a writ of certiorari, respondent hereby submits the following additions:

Sometime in 1972 unknown to the respondent, Linnie Carl McCollan, his brother, Leonard McCollan, procured a duplicate of the respondent's Texas Driver's License containing Leonard's picture but respondent's name and date of birth. Throughout 1972 Leonard McCollan lived in Amarillo (Potter County, Texas) and throughout 1972 and 1973 the respondent, Linnie Carl McCollan lived in Dallas, Dallas County, Texas. After the procurement by Leonard McCollan of the forged ficticious driver's license, Leonard McCollan used this license as his own in Potter County. (SOF 147 - 148). On or about October 6, 1972, Leonard McCollan was arrested in Potter County for sale of narcotic drugs and placed in the Potter County Jail. (T 38-39; Plf. Exh. #1). At the time of this arrest the Potter County Sheriff's Office determined that they had photographs and fingerprints of Leonard McCollan that had been procured by the Potter County Sheriff on another arrest of Leonard McCollan on September 11, 1972. (SOF p. 38-41; Plf. Exh. #2, 3, and 4). The Potter County Sheriff's Office booked Leonard McCollan into the Potter County Jail as Linnie Carl McCollan and further, since Leonard McCollan had appropriated the respondent's name, the warrant that was the authority for placing him in jail was also

in the name of Linnie Carl McCollan.

Also, on October 6, 1972, a Potter County Sheriff's Deputy determined that the driver's license referred to above was altered; i.e., the Sheriff's Deputy determined that the picture on the altered driver's license was not the man whose name and date of birth appeared on the driver's license. Therefore, the Sheriff's Deputy took possession of the driver's license for evidence and for identification purposes (SOF 45-46; 116-118, Plf. Exh. 5).

Shortly after Leonard McCollan was arrested he arranged for a professional bondsman to post his bail and he was released. On November 3, 1972, this bondsman sought and received an order allowing him to surrender his principal and a warrant was issued for the arrest of Leonard McCollan. It must be remembered, however, that the warrant issued pursuant to this request was in the name of the respondent, Linnie McCollan because Leonard McCollan was using his brother's name.

On December 26, 1972, the respondent, Linnie Carl McCollan was in the City of Dallas driving for a mail messenger service and was stopped by a City of Dallas Police Officer and issued a traffic citation for running a red light. In the process of issuing this ticket the Dallas Police Officer learned of the arrest warrant in the name of Linnie McCollan in Amarillo (Potter County, Texas) and caused the respondent to be arrested and placed in the City of Dallas Jail. The Dallas Police Officer called petitioner Baker's office and notified them of the arrest of Linnie McCollan (SOF 138-146). On December 30,

1972, deputies from petitioner Baker's office arrived in Dallas and took custody of the respondent and drove him to Amarillo and then placed the respondent in the Potter County Jail. On January 2, 1973, in the late afternoon, the respondent was released from custody because it was belatedly determined that the respondent was not the man that the Potter County authorities actually wanted. (SOF 141; 145; 152).

The release of the respondent took place because the respondent had insisted that he was not the man Potter County wanted and the Sheriff and his deputies finally, after several day's delay, checked the wanted man's photo and finger prints in their files and readily determined that respondent was not the man they wanted.

At trial, petitioner Baker testified as follows (SOF 68-69):

> BY MR. LARSON:
>
> Q Shortly after this incident occurred you made a determination of the standard kind of operating procedure in counties the size of Potter County do in regards to when someone is arrested outside the county; isn't that true?
>
> A Yes.
>
> Q So the procedure you found out was that mug shots and fingerprints would be mailed down as soon as the notice of a warrant -- notice of arrest to someone wanted under a warrant; isn't that the standard procedure?
>
> A. It would either be mailed or taken down.
>
> Q. Yes. Well, did any of your deputies mail anything down to Dallas to the Dallas Police Department?
>
> A. No, sir.

Q Did either of your deputies take mug shots or were the fingerprints with them when they came down to Dallas to pick him up?

A No, sir. Not to my knowledge.

Sheriff Baker also testified that it was the procedure of his office to photograph and fingerprint prisoners upon their arrest (SOF 31-33) and that a file is kept in his office on each person arrested and in this file folder are kept photographs and fingerprints of each prisoner. Sheriff Baker testified that his office had such a file folder with Leonard McCollan's picture and fingerprints contained therein. (SOF 108-110). Linnie McCollan and Leonard McCollan do not resemble each other in appearance.

At trial, Sheriff Baker testified thusly (SOF 110-111):

Q It's not important for you in your county to find out if you have got the right person or not?

A Yes, that's the reason that it would be necessary for you to take the time and go through the process to make sure who you were talking to in jail if there was some doubt.

Q Sheriff, it took you four days to figure out you had the wrong man?

A There was four days elapsed, there, yes.

Q It would have been a simple thing to just open up the file and look at the picture and you would have known instantaneously that you had the wrong person, right?

A No, the picture alone wouldn't have done it.

Q Why not?

A You need to go through all of your file and you need to know who you were talking to, who you had in jail.

Q Well, now, you're not telling the jury that Plaintiff's Exhibit Three looks like the man sitting over here, are you?

A No.

Q Well, what is it? I don't understand it. What is it that would have been so hard for you to have pulled out that photograph and looked at this man and said it wasn/t the same person?

A Okay. What we had to do or would have had to have done would be to pull the folder out and make sure by fingerprints and everything that we had the correct picture in the file.

Q Well, you had fingerprints, too, didn't you?

A Yes, so it would be necessary for us to have, you know, both of them.

Q Well, if you had pulled the file out and found the picture in there, you would have been kind of worred, you would have done some further checking immediately, isn't that right?

A Yes, sir.

Q But nobody did that in your jail, isn't that right, until four days later?

A That's right.

ARGUMENT

This case does not present the issues that are represented by the questions that petitioner presents for this Court to review. The Sheriff had no right or authority to imprison anyone except the person wanted in the warrant. The circuit court correctly held that the Sheriff could not imprison under the warrant in this case anyone except the man who was actually wanted. See Wolf v. Perryman, 17 SW 772 (Tex. S. Ct. 1891); Whirl v. Kern, 407 F2d 781 (5th Cir. 1968) cert. denied, 396 U.S. 901, 90 S. Ct. 210, 24 L.Ed 2d 197 (1969). The Sheriff had to look no

further than his own files to find the necessary materials to properly ascertain the identity of the wanted man. The Sheriff violated his duty as Sheriff in that he was only authorized to imprison the wanted man and the Sheriff, by the evidence, exhibited indifference to the respondent in failing to ascertain that the respondent was not the wanted man. A man's liberty is too precious to leave without redress a man imprisoned under the facts of this case. The petitioner's reliance upon Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977) as a case from another circuit in conflict with the one at bar is misplaced. The Atkins case is distinguishable upon the law and facts. The claim against the arresting officer in the Atkins case was abandoned and further the arresting officer had no knowledge of the actual identity of Atkins as did the Sheriff in the case at bar. The Atkins case is really one involving prosecutorial immunity and not one concerned with the issues as the one at bar. Further, respondent believes that the reliance on Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L.Ed. 2d 405 (1976) is also misplaced in that the Paul case stands for the proposition that police departments may identify potential thieves without fear of Section 1983 claims.

Reliance by petitioner upon Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1957); Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683, 40 L.Ed. 2d 90 (1974) and Woods v. Strickland, 430 U.S. 308, 95 S. Ct. 992, 43 L.Ed 44 (1975) is also misplaced because in each of these cases the immunity granted to the defendant is one involving discretionary acts.

The act of imprisoning the respondent required no immediate decision. The respondent does not claim a § 1983 claim arose immediately upon his arrest, but when the Sheriff should have discovered that he caused imprisonment of the wrong man. See Whirl v. Kern, supra. The Sheriff was not under any immediate pressure to make a decision, but merely look at his own files and act according to common sense. Had the Sheriff performed his duty, the respondent would have no case.

The Supreme Court has been recently asked on two occasions to review the acts of sheriffs in false imprisonment cases from the Fifth Circuit. Both of these cases involve conflicts between sheriffs and their prisoners, and each time this Court has declined. See Whirl v. Kern, supra, and Bryan v. Jones, 530 F.2d 1210 (5th Cir. - En banc) Cert. denied 429 865, 97 S. Ct. 174, 50 L.Ed. 2d 405 (1976). The case at bar presents issues much less important than Whirl and Bryan.

CONCLUSION

For the above reasons, it is respectfully submitted that the petitioner's application for a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct of the above and foregoing Brief was served upon the petitioner by placing a copy of the same in the United States mail, first class, postage prepaid and properly addressed, this 5th day of December, 1978, to the following:

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Douglas R. Larson

In the

Supreme Court of the United States

October Term, 1978

No. 78-752

T. L. BAKER,

Petitioner,

v.

LINNIE CARL MCCOLLAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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INDEX

Cases

Cases — (Continued)

Constitution of the United States

Statutes

Rules

In the

Supreme Court of the United States

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals is officially recorded in volume 575 F.2d 509 (1978) and is set forth in the appendix, pp. 17-23.[1]

JURISDICTION

The judgment of the court below (A.17-23) was entered on June 19, 1978. A timely petition for a rehearing was denied on August 10, 1978. The petition for writ of certiorari was filed on November 6, 1978 and was granted on January 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] Hereafter, the separately bound appendix to the brief shall be referred to as "A". References to portions of the transcript of proceedings not in the appendix shall be indicated "Tr.".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitution of the United States:

Section 1 of the fourteenth amendment to the Constitution provides in pertinent part:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. United States Code:

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTIONS PRESENTED

1. Whether a failure to have established administrative procedures which might have secured the release of Respondent is actionable under 42 U.S.C. § 1983 absent intent to injure, knowledge of facts requiring action or deliberate indifference to consequences of inaction when the Respondent was arrested and confined in good faith reliance on a valid warrant.

2. Whether, as a matter of law, the Sheriff should be entitled to qualified immunity from claims made under 42 U.S.C. § 1983 when the good faith of the Sheriff is conceded and the reasonableness of the arrest and confinement is supported by a validly issued warrant in the name of Respondent.

3. Whether an official "causes or subjects" one to a deprivation of his rights merely because he has failed through simple negligence to institute a procedure to uncover mistakes of others which were the causes, in fact, of the deprivation.

STATEMENT OF THE CASE

Petitioner T. L. Baker became Sheriff of Potter County on November 20, 1972 (A. 24) following the death of his predecessor (A. 54). At the time he became Sheriff, there was an outstanding warrant for the arrest of one "Linnie Carl McCollan" dated November 3, 1972 (A. 118, P. Ex. 7, admitted Tr. 103). On December 26, 1972 the Potter County Sheriff's Department was notified that the said "Linnie Carl McCollan" was being held by the Dallas Police Department, and on December 30, 1972 a deputy was dispatched to return the prisoner on the warrant (A. 42, 43). Respondent was brought to the Potter County jail on December 30, 1972 and held there until released on January 2, 1973 (A. 44, 45).

Petitioner Baker was not keeping regular office hours during the holiday period of December 30, 1972 through January 1, 1973 (A. 64). Though he was in contact with the personnel at his office during the period, he had no actual knowledge concerning the confinement of Respondent until January 2, 1973 (A. 64, 65). Upon being notified for the first time on January 2, 1973 that Respondent was claiming not to be the person sought by the warrant, Petitioner Baker investigated and determined that the warrant

should have been issued for "Leonard McCollan" and ordered Respondent released (A. 65, 66).

Petitioner Baker learned at the time of releasing Respondent that a person was previously arrested as "Linnie Carl McCollan" but was, in fact, Leonard McCollan, a brother of Respondent (A. 61-63, 112, 113). Leonard McCollan had, at the time of his arrest, exhibited a driver's license describing Respondent and with Respondent's name and driver's license number thereon (A. 60-63). The date of birth and other description taken from the driver's license exhibited by Leonard McCollan was used to identify Respondent at the time of his arrest and was identical to the information contained on Respondent's then current driver's license (A. 95, 106, 111, D. Ex. 13, admitted Tr. 241).

Petitioner Baker's first actual knowledge that Respondent claimed not to be the person sought came on January 2, 1973, six days after the arrest and three days after his transfer to Potter County. Upon learning that Respondent claimed that the warrant should have been for his brother, Petitioner Baker investigated and acted immediately to secure the release of Respondent (A. 65, 66, 113). Following the incident, Respondent Baker inaugurated a policy requiring deputies picking up prisoners in other jurisdictions to take with them available mug shots and fingerprint records (A. 52). At the time of the arrest of Respondent such a policy either did not exist or was not being followed (A. 52, 53).

Respondent went to trial on his Second Amended Complaint in the United States District Court for the Northern District of Texas seeking to recover under 42 U.S.C. § 1983 for false arrest and false imprisonment against the arresting police officer, the Dallas Chief of Police, Sheriff T. L.

Baker and his surety Transamerica Insurance Company (A. 6). Prior to trial the arresting officer and the Dallas Chief of Police were dismissed from the suit (A. 15). After full trial on the merits, the trial court granted Petitioner's motion for directed verdict (A. 11) and dismissed Petitioner and Transamerica Insurance Company from the case (A. 15). The court of appeals reversed and remanded for a new trial (Opinion, A. 17). A petition for rehearing was denied on August 10, 1978. A petition for certiorari was filed herein on November 6, 1978 and granted on January 15, 1979.

SUMMARY OF ARGUMENT

The Fifth Circuit, reviewing a directed verdict, found that a fact issue was raised concerning the Constitutional validity of Respondent's arrest and subsequent confinement for six days notwithstanding that he was arrested and confined in reliance on a warrant naming him and that he was identified by means extraneous to the warrant as the person sought. In so holding, the court below creates a new due process requirement for arrest and confinement. A valid warrant is no longer sufficient; rather, the officers arresting and confining must use the highest standard of care in identifying the person to be arrested and confined or the warrant will not fulfill the requirements of due process.

The court below further erred by equating the general intent to "arrest and confine" with "intent to arrest and confine *without a warrant*." This error was compounded by attributing the intent and conduct to Petitioner though he neither participated, had knowledge of nor in any way acquiesced in the conduct.

Even assuming a recognized federal right was involved, there was no proof of conduct which could amount to anything more than simple negligence. Yet, without directly

speaking to the issue, this Court has consistently required something more than simple negligence to support a cause of action under § 1983.

Under accepted standards of proof, the evidence did not raise any issue of simple negligence. The fact of the occurrence and Petitioner's remedial acts to prevent recurrence are not, and should not have been considered, evidence that his failure to have previously instituted such remedial acts was negligent or was a legal cause of injury to Respondent.

ARGUMENT

I

An action under 42 U.S.C. § 1983 must be based upon conduct of the Defendant causing a deprivation of a protected right.

An action asserted under 42 U.S.C. § 1983 must arise from a deprivation of an identifiable, clearly established right secured by the United States Constitution. Accordingly, the threshold consideration is whether Petitioner in the first instance has posed a Constitutional right as the underpinning of his § 1983 action; absent such a showing, recourse to § 1983 is not available.[2]

The cornerstone of Respondent's § 1983 action is that Petitioner transgressed Respondent's "right" protected by the fourteenth amendment to be free from confinement without "due process of law". The fundamental inquiry is thus whether "due process of law" embodies an absolute requirement that an arrest effected pursuant to a warrant be error-free. An arrest fulfills due process requirements only if it stems from probable cause or a valid warrant. However, due process requirements have never been extended to demand the most effective possible means

[2] *Procunier v. Navarette*, 434 U.S. 555, 55 L.Ed.2d 24 (1978); *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976).

of ascertaining identity in order to have a Constitutionally correct arrest and confinement.

A. Respondent was not deprived of liberty "without due process of law" when arrested pursuant to a warrant valid on its face.

Sheriff Baker's investigation, which was prompted by Respondent's protestations of mistaken identity, confirmed that the warrant should have directed the arrest of Respondent's brother, Leonard McCollan, rather than Respondent, Linnie Carl McCollan. Nevertheless, a warrant had been issued for Linnie Carl McCollan and unquestionably Petitioner had no part in the issuance of the warrant.[3] No question is raised concerning the validity of the warrant. It is also unquestioned that Respondent identified himself as Linnie Carl McCollan and that his driver's license reflected the same birth date and license number as the person previously arrested and for whom the warrant should have been issued.

Generally, an arrest and confinement of a person pursuant to a warrant valid on its face will not support an action under 42 U.S.C. § 1983.[4] The officials executing the warrant will be protected even though the evidence is clear that the warrant should not have been issued for the person arrested.[5] The reasoning of the cases appears to be that the arrest and confinement pursuant to a warrant is not a violation of "due process" because there is no duty to inquire concerning the facts causing the warrant to have

[3] The Fifth Circuit noted, consistent with the evidence, that Sheriff Baker could not be responsible for any failure in connection with the issuance of the warrant because he did not take office until after the warrant had been issued. Footnote 4 of opinion below, A. 21.

[4] *Perry v. Jones*, 506 F.2d 778 (5th Cir. 1975); *Francis v. Lyman*, 216 F.2d 583 (1st Cir. 1954).

[5] *Perry v. Jones*, 506 F.2d 778, 780 (5th Cir. 1975).

been issued. Thus, in these cases there is no deprivation of rights so long as the officer arresting and confining the complaining party was not responsible for the issuance of the warrant.[6]

In the instant case the warrant was unquestionably valid because it fulfilled all governing legal prerequisites. Rather, the court below discarded the warrant as irrelevant by concluding that because it should have been issued for Respondent's brother, Leonard, it conferred no authority to arrest Respondent, notwithstanding that it described him.

The evidence is uncontroverted on this point. Thus the court's conclusion that Respondent was not the man wanted by the warrant is merely a matter of characterization and is certainly open to question. It is logical to conclude that the error was the failure to name Leonard McCollan in the warrant, and that the warrant directed the arrest of Respondent. The court below dismisses this approach by reasoning that this would be tantamount to authorizing a sheriff with a warrant for John Smith to arrest anyone with that name. Yet those were not the facts of this case. Here, a warrant was issued for Linnie Carl McCollan. Respondent identified himself as that man, not only by name but by a driver's license bearing an identical number and date of birth to that of the man sought.[7]

[6] Where the arresting officer is responsible for causing an improper warrant to issue, it is that conduct and not the arrest and confinement that should be quesioned. *Cf. Rodriguez v. Ritchey*, 539 F.2d 394 (5th Cir. 1976) where the court considered actionable the conduct of officers causing a warrant to issue erroneously but exonerated the arresting officers who were not parties to the error.

[7] In *Perry v. Jones*, 506 F.2d 778 (5th Cir. 1975) the court went so far as to create a duty to arrest under certain circumstances. The court said:

> "When Appellant identified himself to deputies holding a warrant for his arrest, their duty was to arrest him, *Greenwell v. United States*, 1964, 119 U.S. App. D.C. 43, 336 F.2d 962, cert. denied, 380 U.S. 923, 85 S.Ct. 921, 13 L.Ed.2d 807." *Id.* at 780.

Even if the warrant is characterized as being for another person, it nevertheless was a valid warrant in the name of Respondent and should have bearing on whether Respondent's deprivation of liberty was without due process of law. Clearly the guilt or innocence of the person arrested has no bearing on the validity of the arrest and confinement. As the Fifth Circuit stated in *Perry v. Jones*:[8]

> "A police officer who arrests someone with probable cause or a valid warrant is not liable for false arrest simply because the innocence of the suspect is later established."[9]

The same rule should apply to the warrant before the Court.[10] Respondent was identified by evidence extraneous to the warrant as the person named in the warrant. This is not the case of a "John Smith" where an arresting officer would arguably be charged with knowledge that there were many John Smiths. Even there, however, the officer should be protected by the warrant if the person arrested is identified as "the John Smith" by evidence other than use of a common name.

If this Court is uncomfortable with the characterization of the warrant as fulfilling due process for the arrest of Respondent, the warrant nevertheless should supply, under these facts, the elements establishing qualified immunity as a matter of law. Such was the conclusion of the court in *Atkins v. Lanning*,[11] which examined a similar situation and concluded that "the arresting officer is entitled to the qualified immunity defense of a good faith belief that his be-

[8] 506 F.2d 778 (5th Cir. 1975).

[9] *Id.* at 780.

[10] *Cf. Atkins v. Lanning*, 556 F.2d 485 (10th Cir. 1977).

[11] *Id.* at 487.

havior was proper."[12] The same result should have followed here where there was no evidence that Petitioner or his deputies acted other than in the good faith belief that their behavior was proper in executing a valid warrant.

B. Petitioner did not intend to confine or act to confine Respondent merely because he authorized his deputies to execute a valid warrant.

Assuming, *arguendo*, that the good faith reliance of Petitioner on the warrant did not insulate him from liability under § 1983, the court below recognized that Respondent, nevertheless, had to present certain minimum proof to establish a cause of action. The court below suggested two hypotheses for concluding that the evidence created a fact issue requiring submission to the jury. Under the first, the court concluded that Respondent established a prima facie case by showing:

> "(1) Intent to confine; (2) acts resulting in confinement; and (3) consciousness of the victim of confinement or resulting harm."[13]

The second hypothesis, fully discussed hereafter, was that Respondent established a prima facie case by showing that Petitioner may have caused the confinement through negligence.

Assuming the court below is correct in describing the elements of a false imprisonment case asserted under § 1983

[12] *Id.* In *Atkins v. Lanning*, a warrant was mistakenly issued for "Timothy Adkins" and based thereon one Timothy Dale Atkins was arrested and confined for thirty-three days before the mistake was discovered. The arresting officer played no part in causing the warrant to have been issued, and notwithstanding the difference in spelling of names on the face of the warrant, the court held that the arresting officer was entitled to qualified immunity as a matter of law, saying: "[T]he arresting officer is entitled to the qualified immunity defense of a good faith belief that his behavior was proper."

[13] A. 20.

the court's conclusion that Respondent demonstrated the required intent and acts on the part of Petitioner is questionable. Accepting that the intent to confine and acts resulting in confinement need not include the specific intent "to deprive a person of a federal right,"[14] the intent and acts to confine "without a valid warrant"[15] would, nevertheless, be required. The deputies did intend to confine Respondent and did act to confine Respondent but it is clear that the deputies were acting pursuant to the warrant and thus had no intent to confine without a valid warrant.

Even if this Court treats the warrant as a nullity from a due process perspective, the evidence does not support the conclusion that Sheriff Baker intended or acted to confine Respondent. Obviously, Sheriff Baker, in executing his elected position, either implicitly or expressly authorized his deputies to execute the warrant. To then conclude, however, that as a result of this general authorization the Sheriff intended and acted to confine Respondent is contrary to the evidence.

No evidence exists that Petitioner Baker specifically intended Respondent to be arrested by the warrant. Conversely, affirmative evidence was presented that Petitioner did not condone the arrest of Respondent and upon the

[14] *Monroe v. Pape*, 365 U.S. 167, 187 (1951).

[15] *Id. Monroe v. Pape*, did not do away with the requirement for intent to commit the wrongful act. In that case, a search was conducted without a warrant. The Court only suggested that the officers need not have a specific intent that the conduct violate a federal law. Here, the court is extending this concept to suggest that the officer need not have the intent to "arrest without a warrant" which was clearly not raised in *Monroe v. Pape*.

first knowledge that Respondent was the person arrested and confined, Petitioner acted immediately to secure his release.[16]

The court below founded its conclusion that the acts and intentions of the deputies should be attributed to Sheriff Baker upon *Jennings v. Patterson*[17] and *Rizzo v. Goode*.[18] The court's reliance on these cases is misplaced. In *Jennings*, the basis for attributing the acts complained of to an official was the full knowledge and acquiescence of the official in those very acts.[19] Similarly, it appeared in *Rizzo v. Goode*, that where an official is to be charged with the acts of subordinates, the official's own conduct must be such that the official can be charged as a participant.[20]

Thus, while citing cases suggesting another standard, the court below actually applied the doctrine of respondeat superior in order to recognize Respondent's prima facie case. This Court has recently held that a § 1983 action

[16] A. 65-68.

[17] 460 F.2d 1021 (5th Cir. 1971).

[18] 423 U.S. 362 (1976).

[19] 460 F.2d 1021, 1022 (5th Cir. 1972). In *Jennings v. Patterson*, the court was reviewing a dismissal of a complaint. With respect to the officials to whom the questioned conduct was to be attributed, the alleged conduct occurred "with the full knowledge and acquiescence" of the officials. The court was clearly dealing with an allegation that the officials had actual knowledge of the wrongful conduct. Here the wrongful conduct complained of was arrest without a warrant. Sheriff Baker was not shown to have known that the wrong man was to be arrested and thus could not have acquiesced in such conduct nor could the court have found the requisite intent to "arrest without a warrant" because there was a warrant.

[20] 423 U.S. 362 (1976). In *Rizzo v. Goode*, this Court also rejected the idea that a subordinate's act and intent can be attributed to his superiors merely because the subordinates have general authority to carry out their offices or more pertinent, because the superiors without actual knowledge have failed to institute a policy to prevent specific misfeasance on the part of the subordinates.

against a municipality cannot be founded solely upon this common law doctrine[21] but that liability should rest upon the acts of the individual defendant.[22] In reviewing the application of the respondeat superior doctrine to § 1983 cases, the court in *Jennings v. Davis*,[23] discussed its history as a "rule of policy" to deliberately allocate the risk of loss caused by employees to the employer who could be expected to respond in damages.[24] Thus there is no reason not to extend the *Monell* holding to cases involving sheriffs as well as municipalities.

The history and purpose of 42 U.S.C. § 1983 and its application by the Court would appear to require participation in the proscribed activity or, at a minimum, knowledge of and acquiescence in the proscribed activity. In *Rizzo v. Goode*,[25] this Court suggested the need for an "affirmative link" between the "misconduct and an adoption of any plan or policy" showing "authorization or approval" before officials would be charged with the acts of subordinates. If Sheriff Baker had previously been confronted with incidents of misidentification and had approved, acquiesced in, or simply ignored the incidents, such evidence might be

[21] *Monell v. New York City Dep't. of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 636 (1978).

[22] *Id.*

[23] 476 F.2d 1271 (8th Cir. 1973).

[24] Relying upon W. Prosser, Law of Torts the court in *Jennings v. Davis*, concluded that respondeat superior was based upon an economic policy rather than the suggestion that the master was a participant in the servant's act. The court said:

"The respondeat superior principle holds liable the 'innocent' master (with the infamous 'deep pocket') for the torts committed by his servant in the course of his employment." *Id.* at 1274.

[25] 423 U.S. 362, 371 (1976).

sufficient to suggest participation.[26] Here, the evidence is to the contrary. Immediately upon being notified that Respondent claimed he was not the person sought, Sheriff Baker investigated and effected the release of Respondent.

Petitioner's good faith and lack of any wrongful intent was further demonstrated by his conduct following this incident in that he thoroughly investigated and instituted new policies in an effort to prevent any recurrence.[27] As will be discussed hereafter, such conduct should not have been considered in determining whether Petitioner's acts were reasonable at the time of the arrest and confinement of Respondent,[28] but is certainly relevant to his intent and good faith.

Petitioner submits that there was no evidence that Respondent was deprived of liberty without due process of law. If, however, the warrant was insufficient to support the arrest and confinement in conformance with due process, good faith reliance upon the warrant impels the conclusion that the qualified immunity doctrine protected the Sheriff under these facts as a matter of law. Furthermore, the

[26] *Id. Rizzo v. Goode*, 423 U.S. 362 (1976) required at least an "affirmative link" between policy and questioned conduct; *Monell v. New York City Dep't. of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 639 (1978) would require at least "official policy" inflicting the injury; and *Jennings v. Patterson*, 460 F.2d 1021 (5th Cir. 1972) would require knowledge and acquiescence. No such element of proof existed here.

[27] The testimony is clear. Sheriff Baker's revised policy was a result of this incident and of his investigation and efforts to prevent a recurrence. A. 52.

[28] Petitioner objected to the introduction of evidence concerning the investigation and change of policy after the incident. The objection was originally sustained (A. 51) but after a lengthy argument out of the presence of the jury, the court decided to admit the evidence (Tr. 62-67). Petitioner's objection and the irrelevancy of the evidence for the purposes suggested by the Fifth Circuit below is supported by Federal Rule of Evidence 407 and case authority. *See* footnote 50, *infra*.

Fifth Circuit erroneously concluded that Petitioner intended to and acted to wrongfully confine Respondent and thus erred in failing to affirm the directed verdict granted by the trial court.

II

A failure to act is not cognizable under 42 U.S.C. § 1983, absent proof of knowledge of the need to act at the time of the failure to act.

The court below in effect held that even if the arrest was proper and the acts of the deputies of Sheriff Baker were not attributable to him, Respondent was, nevertheless, entitled to have the jury answer the question of whether Petitioner had "caused" Respondent's confinement by a failure to have instituted alternative identification procedures at the time Respondent was arrested.[29] Concluding that such a failure was actionable, the court decided that the failure to have these policies created a fact issue concerning the reasonableness element of qualified immunity.[30] The "evidence" supporting Respondent's case and thwarting Petitioner's immunity defense was the same — the search for, and implementation of, new policies in an effort to prevent a recurrence.[31] In so holding, the court did not consider intent a necessary element. Thus, any action found would be based upon unintentional conduct or simple negligence. Furthermore, the negligence suggested by the court is of the passive variety because the

[29] Opinion below, A. 21.

[30] Opinion below, A. 22.

[31] The court noted only the evidence contained in the Sheriff's own testimony concerning his findings after the incident that other departments considered it reasonable to carry mug shots and fingerprint cards when executing a warrant for a person previously arrested, and his corresponding revision in policy. *See* opinion below, A. 22.

Sheriff's liability hinges on what he did not do rather than what he did.

A. Simple negligence alone should not support an action under 42 U.S.C. § 1983.

If simple negligence does not support a cause of action under § 1983, all other questions herein are irrelevant. Even if acts of the deputies are attributed to Sheriff Baker in the first analysis, it is clear that the confusion of the identities of Respondent and his brother Leonard could be characterized, at worst, as simple negligence. Furthermore, it is clear that if negligence does not state a cause of action under § 1983, qualified immunity exists as a matter of law.[32]

This Court said in *Monroe v. Pape*,[33] that 42 U.S.C. § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." This falls short of stating a common law negligence standard for asserting claims under § 1983, particularly when measured against the facts before the the Court. The *Monroe* Court was reviewing a dismissal of a complaint alleging an unconstitutional search and arrest unsupported by a search warrant or an arrest

[32] Petitioner has not attempted to deal with the issue of burden of proof in considering the question of negligence. Nevertheless, if negligence is not actionable, to suggest that a defendant must demonstrate non-negligence to support qualified immunity is inconsistent. The courts have not considered §1983 in this context. Rather, there has been some indication of a burden on a Plaintiff to show affirmative acts and affirmative intent with the Defendant being allowed to defend by showing good faith and that it was not unreasonable to have formed the good faith belief that the actions were proper. These standards are not identical to traditional negligence standards of care or conduct. A holding that simple negligence was not actionable would not create significant problems with existing standards but would make clear that the qualified immunity doctrine is not based upon a showing of non-negligence as construed by the court below.

[33] 365 U.S. 167, 187 (1961).

warrant. The complaint alleged that the defendant police officers broke into plaintiff's home, searched the home and took plaintiff to the police station and detained him without charges, all without the benefit of legal process. In making the above quoted statement, the Court in *Monroe v. Pape*, was responding to defendant's contention that § 1983 required allegations that defendants had acted with a specific intent to deprive a person of a federal right."[34] In the context of the case, the Court did not do away with a requirement for intentional conduct, but only the requirement that one specifically intend to violate a federal right.[35]

To date this Court has not clearly stated whether simple negligence in the form of unintentional acts which directly or indirectly result in a deprivation of rights, states a cause of action under 42 U.S.C. § 1983. Recently this issue was before the Court in *Procunier v. Navarette*.[36] The Court decided the case by determining that the persons charged were entitled to immunity as a matter of law since the right involved had not been a recognized federally protected right. Chief Justice Burger dissented to the Court's failure to consider the issue here presented and indicated that he "would hold that one who does not intend to cause and does not exhibit deliberate indifference to the risk of causing the harm that gives rise to the constitutional claim is not liable for damages under § 1983."[37]

[34] *Id.*

[35] *See* discussion of *Monroe v. Pape* in *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976) where the court said:

"The *Monroe* standard dealt with facts showing intentional conduct by police which they were legally bound to know would deprive Monroe of Constitutional rights. All that the 'tort liability' language of *Monroe* really establishes is that a specific intent to violate Constitutional rights of the Plaintiff is not required for a Section 1983 violation. . . ." *Id.* at 567.

[36] 434 U.S. 555, 55 L.Ed.2d 24 (1978).

[37] *Id.* 55 L.Ed. 2d at 34.

The adoption of the standard advocated by Chief Justice Burger or a similar standard would also be consistent with the Court's stated views in *Paul v. Davis*,[38] wherein the Court decried the use of § 1983 and the due process clause of the fourteenth amendment as "a font of tort law to be superimposed on whatever systems may already be administered by the states." [39]

That a clearly enunciated standard is needed is demonstrated by the conflicting decisions arising in the circuit courts. In the instant case, the court below suggests that a cause of action can be founded upon mere negligence which in turn causes, or is likely to cause, errors which will result in a deprivation of a right. Conversely, the Seventh Circuit in *Bonner v. Coughlin*,[40] concluded that § 1983 was not designed to redress cases of simple negligence. In its discussion of § 1983 the court stated the following:

> "Neither the language of the statute nor its history shows that Congress was providing a federal remedy for damages caused by the simple negligence of a state employee. In enacting the Civil Rights Act, Congress was obviously intending to provide a deterrent for the type of conduct proscribed. If an officer intentionally causes a property loss, a remedy under § 1983 might deter similar misconduct. On the other hand, extending the § 1983 to cases of simple negligence would not deter future inadvertence as much as in the case of intentional or reckless conduct. Consequently the majority of circuits hold that mere negligence does not state a claim under § 1983. [Footnote omitted] Otherwise the Federal courts would be inundated with state tort cases in the absence of Congressional intent to widen Federal jurisdiction so drastically."[41]

[38] 424 U.S. 693 (1976).
[39] *Id.* at 701.
[40] 545 F.2d 565 (7th Cir. 1976).
[41] *Id.* at 568.

Because Congressional intent was not clear, this Court should speak affirmatively on the issue, leaving Congress the option of remedying any misstatement of its intent. The weight of current authority suggests that negligence should not be the basis for a § 1983 action.[42] Furthermore, if the Court concludes that Congress did intend § 1983 to encompass unintentional acts amounting to no more than simple negligence, the federal courts will be called upon to review all internal operating procedures of every law enforcement agency each time an arrest, confinement or treatment is questioned to determine whether the defendant should have used better procedures under the circumstances.

B. A failure to act is not negligence absent knowledge requiring action.

In the event this Court determines that simple unintentional acts can pose colorable § 1983 claims, the conclusions of the court below are nevthertheless suspect. The actionable "conduct" of Petitioner was a failure to act rather than any affirmative conduct with respect to the Respondent. Certainly, there are compelling circumstances when a failure to respond is considered affirmative conduct. Where, as here, there is no evidence of any circumstance or knowledge existing at the time of the failure to act indicating a need for affirmative conduct, the failure to act should have no factual or legal import.

The Fifth Circuit held as follows:

> "The only real question in this case is whether the Sheriff's failure to introduce a policy of sending photographs and fingerprints or his failure to have someone on duty to check Plaintiff's identity upon his arrival or during his stay at Potter County jail was unreasonable."[43]

[42] *See* review of authorities in footnote 8 of *Bonner v. Coughlin*, 545 F.2d at 568.
[43] Opinion below, A. 21.

The court's frame of reference was the Petitioner's failure to make actual comparisons of Respondent with the mug shots and fingerprints contained in the files when Respondent was picked up in Dallas and delivered to the Potter County jail. The "evidence" indicating that such a policy should have been instituted was the occurrence itself and Sheriff Baker's subsequent efforts to prevent a recurrence.[44]

If simple negligence is to be actionable under § 1983, then traditional concepts of tort law should be applied. [45] Fundamental to a showing of negligence is a finding that the actor has a duty to act in a prescribed manner. Where the questioned conduct is affirmative action, simple negligence may flow from the general duty to act reasonably. Where the alleged negligent conduct is inaction, one must first find a duty owed by the nonacting party. Here that duty would presumably be to use reasonable care to identify persons named in a warrant for arrest. A breach of duty minimally requires proof that the method used was unreasonable.

This proof was missing herein. Rather, the court rested its conclusion on the premise that the failure to have a method not used might have been unreasonable, on the proof that the occurrence happened, and on its observation that Sheriff Baker instituted a policy to prevent its recurrence. Thus the court discerned no evidence, nor was any presented, to demonstrate that the method of identification

[44] *See* footnote 31, *supra.*

[45] Disregarding the special burden borne by a Plaintiff in a § 1983 action, Respondent has not posed a cause of action cognizable under prevailing common law false imprisonment standards, at least as applied in Texas. *See Workman v. Freeman*, 289 S.W.2d 910 (Tex. 1966) and *McBeath v. Campbell*, 12 S.W.2d 118 (Tex. Comm'n App. 1921, holding approved), which establish that liability of a Sheriff under these facts is incurred only when he learns of a wrongful incarceration and does nothing.

used at the time of Respondent's arrest and confinement was unreasonable or that Sheriff Baker then knew of a need for a new policy. Without discussing negligence, this Court has consistently exonerated officials for failing to act to change or implement policy when they could not be charged with actual knowledge of the likelihood of the unlawful acts at the time of the occurrence. [46] Certainly *Rizzo v. Goode*,[47] is consistent with this approach.

The rules of evidence preclude the admissability of corrective actions taken after the fact of an injury as evidence that the occurrence was the result of negligence.[48] In addition to having no logical bearing on the reasonableness of conduct, allowing subsequent policy adjustments to give rise to liability for past conduct would discourage officials from improving policies in response to past errors.[49]

[46] See, *e.g.*, *Butz v. Economou*, U.S. , 57 L.Ed.2d 895 (1978); *Procunier v. Navarette*, 434 U.S. 555, 55 L.Ed.2d 24 (1978); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Rizzo v. Goode*, 423 U.S. 362 (1976).

[47] 423 U.S. 362 (1976).

[48] *Fed. R. Evid.* 407. *See also Columbia & Puget Sound R.R. Co. v. Hawthorne*, 144 U.S. 202, 206 (1891) where this Court long ago said concerning evidence of changes in machinery after an accident:

> "[I]t is now settled, upon much consideration by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant."

The Court indicated further that policy reasons dictated such a rule as well. If the rule were otherwise, the person in authority would be reluctant to change a policy for fear it would suggest past error.

[49] *Columbia & Puget Sound R.R. Co. v. Hawthorne*, 144 U.S. 202, 206 (1891).

If the action taken after Respondent was released is not relevant, the only other evidence of "negligence" at the time of the event in question would be the event itself. Again, traditional tort concepts hold that proof of the event is not itself evidence of negligence[50] unless the circumstances are such to give rise to the doctrine of *res ipsa loquitur*.[51] That doctrine is not available here, however, because Respondent could not and did not demonstrate an inability to prove the causes in fact of the action.[52]

The tenuousness of the lower court's characterization of unreasonableness of the failure to act is further demonstrated when the factor of causation is brought into play. Only by using the "but for" standard of causation may the Sheriff's failure be said to have "subjected, or caused to be subjected" Respondent to a deprivation. It, thus, becomes apparent that Sheriff Baker is not being called to task for having an improper policy, "but for" failing to have another policy which might have prevented injury under the

[50] *Rankin v. Nash-Texas Co.*, 105 S.W.2d 195, 199 (Tex. Comm'n App. 1937, opinion adopted), stated the state common law rules as follows: "The occurrence of an accident, or a collision, is not of itself evidence of negligence." *See also Gulf Refining Co. v. Delavan*, 203 F.2d 769 (5th Cir. 1953).

[51] The doctrine of *res ipsa loquitur* arises only where defendant has sole control of the instrumentality causing the injury and the circumstances are such that the event would not ordinarily have occurred in the absence of negligence. *Mobil Chemical Co. v. Bell*, 517 S.W.2d 245 (Tex. 1975).

[52] In the instant case, the causes, in fact, leading to the event are known. Further, it is also known that Petitioner did not have control of all of the factors giving rise to the event. He did not control Respondent's brother who used a false identity nor control the issuance of the warrant. Under these circumstances, the cases consistently hold that the happening of the event is not evidence of negligence. *See, e.g., Gulf Refining Co. v. Delavan*, 203 F.2d 769 (5th Cir. 1953); *Mobil Chemical Co. v. Bell*, 517 S.W.2d 245 (Tex. 1975); *Robinson v. Crump*, 422 S.W.2d 536 (Tex Civ. App.—Houston [14th Dist.] 1967), writ ref'd n.r.e. per curiam, 427 S.W.2d 861 (Tex. 1968).

circumstances. If such causation is allowed to support a cause of action under § 1983, the results will be far more extensive than merely holding that simple negligence states a cause of action. For notwithstanding the ultimate good faith of the actor, the Court must examine what he might have done to have prevented such occurrence. If a potentially superior policy is perceived, then the actor will be deemed to have "caused" the injury because "but for" his failure to have the alternate policy, the injury would not have occurred.

This "but for" or indirect causation used by the lower court is not legal causation under normal tort law application. The chain of causation developed at trial included acts of Respondent's brother (Leonard McCollan) who obtained a duplicate of Respondent's driver's license with his (Leonard's) picture thereon, his act of holding himself out as Respondent, the surrender of a bond by Leonard's bondsman causing a warrant to be issued for "Linnie Carl McCollan", and the ultimate identification of Respondent as Linnie Carl McCollan, an identity he did not deny but admitted. Yet the failure to have had a particular policy created no more than a condition allowing the event to happen and was not, under general tort law, a legal cause of the happening.[53] To suggest that Respondent's incarceration was a forseeable consequence of the acts taken or not taken is unrealistic.

This analysis also makes clear that the Fifth Circuit is imposing a higher standard of care on the Sheriff than is associated with simple negligence. The standard is one

[53] One test of whether an act or omission can be considered as the legal or actionable cause of an injury is whether the injury is a reasonably forseeable consequence of the act or omission. *Carey v. Pure Distributing Corp.* 124 S.W.2d 847 (Tex. 1939); *Texas & P. Ry Co. v. Bigham*, 38 S.W. 162 (Tex. 1896).

of strict liability in tort and an absolute duty to use the highest standard of care requiring a Defendant to anticipate events and circumstances merely because the occurrence demonstrates that the event could happen.

Petitioner thus submits that simple negligence should not be the basis of § 1983 claims. In the event this Court concludes otherwise, it should nevertheless reverse the court below because the facts herein do not, as a matter of law, support the submission of a negligence issue.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed, affirming the directed verdict granted Petitioner by the district court.

Respectfully submitted,

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FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-752

T.L. BAKER,

Petitioner

v.

LINNIE CARL MCCOLLAN,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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INDEX

TABLE OF AUTHORITIES

CASES:

STATUTES:

Page

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

(The respondent as the following brief indicates does not believe that the following issues framed by the petitioner accurately portray any of the issues in this case, but since petitioner framed the issues, respondent, to avoid confusion, will adopt them. In addition, question number 2 is inaccurate in that respondent has *not* conceded the good faith of Sheriff Baker).

1. Whether a failure to have established administrative procedures which might have secured the release of respondent is actionable under 42 U.S.C. § 1983 absent intent to injure, knowledge of facts requiring action or deliberate indifference to consequences of inaction when the respondent was arrested and confined in good faith reliance on a valid warrant.

2. Whether, as a matter of law, the sheriff should be entitled to qualified immunity from claims made under 42 U.S.C. § 1983 when the good faith of the sheriff is conceded and the reasonableness of the arrest and confinement is supported by a validly issued warrant in the name of respondent.

3. Whether an official "causes or subjects" one to a deprivation of his rights merely because he has failed through simple negligence to institute a procedure to uncover mistakes of others which were the causes, in fact, of the deprivation.

STATEMENT OF THE CASE

Sometime in 1972, unknown to respondent, Linnie Carl McCollan, his brother, Leonard McCollan, procured a duplicate of the respondent's Texas Driver's License containing Leonard's picture but respondent's name and date of birth. Throughout 1972 Leonard McCollan lived in Amarillo (Potter County, Texas) and throughout 1972 and 1973 the respondent, Linnie Carl McCollan, lived in Dallas, Dallas County, Texas. After the procurement by Leonard McCollan of the

forged ficticious driver's license, Leonard McCollan used this license as his own in Potter County. (SOF 147-148). On or about October 6, 1972, Leonard McCollan was arrested in Potter County for sale of narcotic drugs and placed in the Potter County Jail. (S.O.F. 38-39; Plt. Exh. #1). At the time of this arrest the Potter County Sheriff's Office determined that they had photographs and fingerprints of Leonard McCollan that had been procured by the Potter County Sheriff on another arrest of Leonard McCollan on September 11, 1972. (S.O.F. p. 38-41; Plf. Exh. #2, 3, and 4). The Potter County Sheriff's Office booked Leonard McCollan into the Potter County Jail as Linnie Carl McCollan and further, since Leonard McCollan had appropriated the respondent's name, the warrant that was the authority for placing him in jail was also in the name of Linnie Carl McCollan.

Also, on October 6, 1972 a Potter County Sheriff's Deputy determined that the driver's license referred to above was altered; i.e., the Sheriff's Deputy determined that the picture on the altered driver's license was not the man whose name and date of birth appeared on the driver's license for evidence and for identification purposes (S.O.F. 45-46; 116-118, Plf. Exh. 5).

Shortly after Leonard McCollan was arrested he arranged for a professional bondsman to post his bail and he was released. On November 3, 1972, this bondsman sought and received an order allowing him to surrender his principal and a warrant was issued

for the arrest of Leonard McCollan. It must be remembered, however, that the warrant issued pursuant to this request was in the name of the respondent, Linnie McCollan because Leonard McCollan was using his brother's name. Leonard McCollan then disappeared and the warrant has apparently never been served on him.

On December 26, 1972, the respondent, Linnie Carl McCollan was in the City of Dallas driving for a mail messenger service and was stopped by a City of Dallas Police Officer and issued a traffic citation for running a red light. In the process of issuing this ticket the Dallas Police Officer learned by radio of the arrest warrant in the name of Linnie McCollan in Amarillo (Potter County, Texas) and caused the respondent to be arrested and placed in the City of Dallas Jail. The Dallas Police Officer called petitioner Baker's office and notified them of the arrest of Linnie McCollan (S.O.F. 138-146). On December 30, 1972, deputies from petitioner Baker's office arrived in Dallas and took custody of the respondent and drove him to Amarillo and then placed the respondent in the Potter County Jail. From the time of respondent's arrest and incarceration on December 26, 1972, until his release on January 2, 1973, respondent insisted that he was *not* the man they wanted and further *that a mistake had been made.* On January 2, 1973, in the late afternoon, the respondent was released (S.O.F. 141; 145; 152).

The release of the respondent took place because while respondent had insisted that he was not the man Potter County wanted he was ignored until January 2, 1973. The sheriff and his deputies finally, after several days' delay, compared the wanted man's photo and finger prints in their files with the respondent and readily determined that respondent was not the man they wanted.

At trial, petitioner Baker testified as follows (S.O.F. 68-69):

> BY MR LARSON:
>
> Q Shortly after this incident occurred you made a determination of the standard kind of operating procedure in counties the size of Potter County do in regards to when someone is arrested outside the county; isn't that true?
>
> A Yes.
>
> Q So the procedure you found out was that mug shots and fingerprints would be mailed down as soon as notice of a warrant—notice of arrest to someone wanted under a warrant; isn't that the standard procedure?
>
> A It would either be mailed or taken down.
>
> Q Yes. Well, did any of your deputies mail anything down to Dallas to the Dallas Police Department?
>
> A No, sir.
>
> Q Did either of your deputies take mug shots or were the fingerprints with them when they came down to Dallas to pick him up?

A No, sir. Not to my knowledge.

Sheriff Baker also testified that it was the procedure of his office to photograph and fingerprint prisoners upon their arrest (S.O.F. 31-33) and that a file is kept in his office on each person arrested and in this file folder are kept photographs and fingerprints of each prisoner. Sheriff Baker testified that his office had such a file folder with Leonard McCollan's picture and fingerprints contained therein and that the file containing the pictures and fingerprints of the man actually wanted were readily accessible to the sheriff and his deputies in the jail. (S.O.F. 108-110). Linnie McCollan and Leonard McCollan do not resemble each other in appearance.

At trial, Sheriff Baker testified thusly (S.O.F. 110-111):

Q It's not important for you in your county to find out if you have got the right person or not?

A Yes, that's the reason that it would be necessary for you to take the time and go through the process to make sure who you were talking to in jail if there was some doubt.

Q Sheriff, it took you four days to figure out you had the wrong man?

A There was four days elapsed, there, yes.

Q It would have been a simple thing to just open up the file and look at the picture and you would have known instantaneously that you had the wrong person, right?

A No, the picture alone wouldn't have done it.

Q Why not?

A You need to go through all of your file and you need to know who you are talking to, who you had in jail.

Q Well, now, you're not telling the jury that Plaintiff's Exhibit Three looks like the man sitting over there, are you?

A No.

Q Well, what is it? I don't understand it. What is it that would have been so hard for you to have pulled out that photograph and looked at this man and said it wasn't the same person?

A Okay. What we had to do or would have had to have done would be to pull the folder out and make sure by fingerprints and everything that we had the correct picture in the file.

Q Well, you had fingerprints, too, didn't you?

A Yes, so it would be necessary for us to have, you know, both of them.

Q Well, if you had pulled the file out and found the picture in there, you would have been kind of worried, you would have done some further checking immediately, isn't that right?

A Yes, sir.

Q But nobody did that in your jail, isn't that right, until four days later?

A That's right.

At the close of all of the evidence the trial court instructed a verdict for defendant apparently for the reason that the trial court believed that as a matter of law Sheriff Baker was entitled to rely on the warrant.

SUMMARY OF ARGUMENT

Respondent does not believe that this case is a case involving negligence but rather is one involving the intentional tort of false imprisonment. Respondent believes that this case more appropriately involves Sheriff Baker's failure to supervise his deputies and his jail and Baker's intentional failure to establish policies to avoid the incarceration of respondent. Alternatively, respondent believes that the sheriff is liable because of deliberate indifference to the rights of respondent. Respondent further suggests in some proper cases negligence is actionable under § 1983 and respondent believes that the defense of good faith is not available to the petitioner under the facts of this case.

ARGUMENT

I.

This Is Not A Mere Negligence Case Because This Case Involved A Deprivation Under The Constitution And Involves The Protected Right To Be Free From Unlawful Imprisonment And The Record And Law Does Not Support The Contentions Of Petitioner That This Is A Negligence Case.

Counsel for petitioner misperceives the issues in this case and apparently the opinion in the court below as a case involving negligence.[1] In the opinion of the respondent this is really a case involving the intentional tort of false imprisonment and the failure of Sheriff Baker to supervise his deputies and manage his jail. The opinion in the court below speaks for itself. The word negligence does not even appear in the court's opinion. The court below in *McCollan* v. *Tate*, 575 F.2d 509 (5th Cir. 1978) said as follows:

> *Bryan* made clear that in a section 1983 false imprisonment action the reasonable good faith of the sheriff comes into play only as a defense. To make out a prima facie case, a plaintiff need show only: (1) intent to confine; (2) acts resulting in confinement; and (3) consciousness of the victim of confinement or resulting harm. 530 F.2d at 1213, citing Restatement (2d) Torts § 35 (1965). There can be no doubt that the sheriff's deputies intended to confine and did confine the plaintiff. Similarly, there can be no doubt that plaintiff

[1] It is significant to note that counsel for the petitioner apparently did not perceive that negligence may be a reason for avoiding § 1983 liability until oral arguments at the fifth circuit. When the court asked both counsel what effect, if any, did counsel believe that effect of a possible nonactionable negligence holding under § 1983 in *Procunier* v. *Navarette* would have on this case. (At the time of oral arguments the opinion in *Procunier* had not been delivered.) There was no motion to dismiss filed stating negligence as a reason for avoiding § 1983 liability in the trial court, there was no mention of it as a means to avoid § 1983 liability in this arguments to the trial court (see S.O.F. pp. 210-241), there is no direct mention of negligence in his answer filed in the trial court (App. 1-6) and counsel opposites' briefs in the Fifth Circuit make no mention of negligence either. In fact the main thrust of petitioner's argument in the Fifth Circuit was that Sheriff Baker could rely on the warrant.

was aware of the fact that he was being held in jail. Since the deputies' action were authorized by Sheriff Baker and the same actions were in keeping with the policies of the Potter County Sheriff's Department at that time, plaintiff established his prima facie case against Sheriff Baker. See *Jennings* v. *Patterson*, 460 F.2d 1021 (5th Cir. 1972). Cf. *Rizzo* v. *Goode*, 423 U.S. 362, 96 S. Ct. 598, 46 L.Ed 2d 561 (1976) (Supervisory officials not subject to injunction under section 1983 where no showing that they authorized or approved lower officials' misconduct). Assuming arguendo that the actions and intent of the deputies are not properly attributable to the sheriff,[2] on the facts of this case plaintiff was entitled to go to the jury on the basis of Sheriff Baker's own action or inaction. To incur liability under section 1983 a state official need not directly subject a person to a deprivation of his constitutional rights. The language of the statute[3] and the holdings of this court make clear that he can be held liable if he causes the plaintiff to be subjected to a deprivation of his constitutional rights. See *Sims* v. *Adams*, 537 F.2d 829 (5th Cir. 1976). Sheriff Baker's failure to require his deputies to transmit the identifying material described above "caused" plaintiff's continued detention. Plaintiff has made out a prima facie case under *Bryan*, and Sheriff Baker can escape liability only if he acted in reasonable good faith. As the court said in *Bryan*, "[i]f [the sheriff] negligently establishes a . . . system in which errors of this kind are likely, he will be held liable." 530 F.2d at 1215.

> The only real question in this case is whether the sheriff's failure to introduce a policy of sending photographs and fingerprints identity upon his arrival or during his stay at Potter County Jail was unreasonable.[4]
>
> (Footnotes omitted.)

To properly analyze this case it is more appropriately viewed on two levels. The first level is the actions or inactions of the sheriff and/or the sheriff's predecessor in office in failing to cause the name on the warrant to be changed or alternatively making it known that the name on the warrant was in error. The record in the trial court makes it abundantly clear that the sheriff and/or his deputies or at least the sheriff's predecessor in office and the predecessor's staff knew or should have known that the person actually wanted (Leonard) was not using his real name. It is undisputed that no one made any effort to correct the name on the warrent. The second level on which this case should be analyzed is what the sheriff did when the respondent was imprisoned and the sheriff became aware of the imprisonment and then what the sheriff did when the respondent came into his custody or subject to his control. The second level of analysis is clearly where the Fifth Circuit focused its intention in its opinion.[2] See the full opinion in *McCollan* v. *Tate*, *supra*.

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[2] In fact this has been McCollan's position from the beginning. Counsel for petitioner made it clear in his oral arguments to the trial court (S.O.F. 230-238) in response to the sheriff's motion for

To further emphasize and clarify the respondent's position enunciated above, McCollan's § 1983 claim against the sheriff is not for the wrong name being placed in the warrent or the failure to discover and change same or even the initial arrest of the respondent, but rather for the intentional failure to investigate and determine that the wrong man was imprisoned. This case is a false imprisonment case and thus one involving an intentional "tort." See the Restatement of Torts Second, § 44. Negligence is certainly present in the case at the first level indicated above but it does not in respondent's view determine the outcome of respondent's § 1983 claim on the second level. *Whirl* v. *Kern*, 407 F.2d 781 (5 Cir. 1969) at page 792, states the law which respondent believes which controls this case is as follows:

> . . . The tort of false imprisonment is an intentional tort. Restatement of Torts, Second, § 44. It is committed when a man intentionally deprives another of his liberty without the other's consent and without adequate legal justification.

---

instructed verdict and in his oral argument in the 5th Circuit that Mr. McCollan's case was clearly predicated on what actions Sheriff Baker took after McCollan was incarcerated and not what happened prior to the arrest. Additionally, respondent was relying on the following language in *Whirl* v. *Kern*, 407 F.2d 781 at 792 (5 Cir. 1969):

> The sheriff, of course, must have some protection too. His duty to his prisoner is not breached until the expiration of a reasonable time for the proper ascertainment of the authority upon which his prisoner is detained. We are to be interpreted as holding that a sheriff commits an instant tort at the moment when his prisoner should have been released.

> *Roberts* v. *Hecht Co.*, D.Md.1968, 280 F.Supp. 639, 640; *Browning* v. *Pay-Less Self Service Shoes, Inc.*, Tex.Civ.App. 1963, 373 S.W. 2d 71 (no writ); 32 Am.Jur.2d, False Imprisonment § 1 (1968).

Sheriff Baker acted in the role as the respondent's surrogate jailer in Dallas as well as his real jailer in Potter County and, as such, his duties to the respondent are not based in negligence but are intentional acts. It is clear that the Restatement of Torts Second § 125 (1965)[3] places the duty upon Sheriff Baker to exercise due diligence in making sure that person imprisoned is actually the person wanted. Without

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[3] The text of § 125 and comment (d) reads as follows:

> § 125. Name or Description of Person Arrested Under Warrant
> An arrest under a warrant is not privileged unless the person arrested
> (a) is a person sufficiently named or otherwise described in the warrant and is, or is reasonably believed by the actor to be, the person intended, or
> (b) although not such person, has knowingly caused the actor to believe him to be so.
>
> . . .
>
> d. Two persons with same name. An error in an additional initial or its omission or erroneous insertion is not important, unless the actor knows or should know that there are two persons to whom the Christian name and surname are equally applicable. If there are two such persons—as also if there are two persons to whom the name applies with complete accuracy or with substantially equal sufficency—the actor is privileged to arrest the one whom, after using due diligence, he reasonably believes to be the person intended.

In addition to the "Restatement" see 127 A.L.R. 1057-1066; 10 A.L.R. 2d 750-757; and *False Imprisonment* 25 Tex Jur 2d§ 36.

doubt the court below recognized the sheriff's duty as should this Court in the opinion of respondent. An officer who causes the arrest or detention of the wrong person mentioned in a warrant is liable for false imprisonment. *Landrum* v. *Wells*, 26 SW 1001 (Tex. Civ. App. 1894); *Clark* v. *Winn*, 46 SW 915 (Tex. Civ. App. 1898); *Schnaufer* v. *Price*, et al, 124 SW2d 940 (Tex. Civ. App. 1939). The officer assumes the risk and hazard of the imprisoned person being the wrong one and it is no defense that the name of the person imprisoned is the same. *Wolf* v. *Perryman*, 17 SW 772 (Tex. S.Ct. 1891). In *Wolf* v. *Perryman* the sheriff arrested the plantiff on a warrant from another county for murder. The sheriff delivered the plaintiff to a deputy from the county from which the warrant issued. The plaintiff had the same name as was in the warrant. The court in this case said that the arrest was the peril of the sheriff from the beginning. See also *Inmon* v. *Mississippi* 278 F 23 (5th Cir. 1922). Again see *Whirl* v. *Kern*, 407 F.2d 781 (5th Cir. 1969) at 792 for further clarification.

> Ignorance and alibis by a jailer should not vitiate the rights of a man entitled to his freedom. A jailer, unlike a policeman, acts at his leisure. He is not subject to the stresses and split second decisions of an arresting officer, and his acts in discharging a prisoner are purely ministerial. Moreover, unlike his prisoner, the jailer has the means, the freedom, and the duty to make necessary inquiries. While not a surety for the legal correctness of a prisoner's commitment. *Ravenscroft* v. *Casey*, 2 Cir. 1944, 139 F.2d 776, cert.

> denied, 323 U.S. 745, 65 S.Ct. 63, 89 L.Ed. 596; *DeWitt* v. *Thompson*, 1942, 192 Miss. 615. 7 So.2d 529, he is most certainly under an obligation, often statutory,[11] to carry out the functions of his office. Those functions include not only the duty to protect a prisoner, but also the duty to effect his timely release.

Many who have read and commented on *Whirl* v. *Kern, supra*, have classified it as a negligence case but respondent does not believe that conclusion is justified. *Whirl* involved a former prisoner's suit under § 1983 against Sheriff Kern for keeping Whirl imprisoned for over nine months after his case had been dismissed and the authority for holding him had terminated. The claim was false imprisonment, an intentional tort, not negligence. The jury in *Whirl* was given negligence instructions as the case was in the Fifth Circuit because of these erroneous instructions as the jury had found that Sheriff Kern was not negligent. The court in *Whirl* held that Whirl was entitled to a directed verdict for the intentional tort of false imprisonment. As in *Whirl* the respondent believes that this case at bar involves intentional action and an intentional tort.

The leading case in the Fifth Circuit on a sheriff's liability in a false imprisonment case under § 1983 is *Bryan* v. *Jones*, 530 F.2d 1210 (5th Cir) (enbanc), cert denied 429 U.S. 865 (1976). *Bryan* was decided after *Whirl* and in essence affirmed the holdings in *Whirl* and stated that if a sheriff establishes a system under

which errors a likely to falsely imprison a man, the sheriff is liable. *Bryan* unlike *Whirl* did establish a good faith defense if the sheriff relied on errors made outside his realm of responsibility. The *Whirl* court had decided that good faith was not a defense to false imprisonment under any circumstance. Here in the case at bar the sheriff cannot rely on *Bryan* because the errors were of his own making, i.e. Sheriff Baker failed to establish a system to (1. forward the "mug shots" and fingerprints to "Dallas" and/or establish and enforce a system of comparing the "mug shots" and fingerprints with the prospective prisoner.

II.

The Facts Of This Case Support The Conclusion That Sheriff Baker Exhibited "Deliberate Indifference Toward McCollan.

Respondent suggests there is a possible second method of justifying the results reached in the 5th Circuit in the case at bar. *Estelle* v. *Gamble*, 429 U.S. 97 (1976) stated the standard for § 1983 cases under the Eighth Amendment to the Constitution. The court in *Estelle* v. *Gamble* created the standard of "deliberate indifference" in cases where prisoners are complaining about treatment and conditions in prisons. Isolated acts of negligence are not actionable but acts that indicate "deliberate indifference" are.

From reading the petitioner's brief one could conclude that the plaintiff quietly accepted his predicament and from his arrest to his release told no one he

was the wrong man. This is definitely not the case because it is undisputed that the plaintiff told every police officer and sheriff's representative that he came into contact with that he was not the wanted man and told everyone that a mistake had apparently been made. All of the plaintiff's protests were ignored and no one made any further inquiry or investigation. As stated many times before the sheriff had pictures of the wanted man, Leonard McCollan, and no one compared them to the respondent. The Fifth Circuit even noted that there was no resemblance between the real Leonard and Linnie. Respondent submits that the sheriff and his deputies ignored the plaintiff's protests and as such showed "deliberate indifference" or "reckless disregard" to his right not to be subjected to imprisonment. *Estelle* v. *Gamble, supra.* Surely the right not to be falsely imprisoned when the person causing the imprisonment has the means readily at hand to ascertain that the wrong man is imprisoned is actionable under § 1983. Under our system a man's liberty is too precious for a sheriff to escape liability especially when the mistake is so easily discovered and the jailer so readily ignores his protests.

III.

In Certain Situations Negligence Is Actionable Under § 1983.

Respondent does not believe that this case involves negligence but concedes that one could possibly read the Fifth Circuit's opinion in the court below as a

mere negligence case and/or disagree with the assertions made above. However, it is respondent's position that under certain circumstances that negligence is actionable under § 1983. Authority for this position is found in *Monroe* v. *Pape,* 365 U.S. 167 (1961) an opinion where Justice Douglas writing for eight members of the Supreme Court concluded after an exhaustive examination of legislative history of § 1983 that "by reason of prejudice, passion, *neglect, intolerance or otherwise,* state laws might not be inforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the 14th Amendment might be denied by state agencies" 365 U.S. 180. (Emphasis added). Indeed the statute itself on its face has no limitation of what kind of actions can be brought under it. Even those who supported it in Congress indicated there were no limitations; E.g. a comment in *Monroe* v. *Pape,* 365 U.S. at 174 N.10 indicates thusly:

> The speaker, Mr. Arthur of Kentucky, had no doubts as to the scope of § 1: "[I]f the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a soraph, for a mere error in judgment [he is liable] . . . (emphasis in original)

The apparent underlying purposes of § 1983 are to deter infringement of constitutionally protected rights and compensate those who were damaged. The

Supreme Court concluded in *Monroe* v. *Pape, supra,* that Congress by no means wished to limit the remedial effects of this statute to a narrow focus on purely intentional conduct by state officials. *Monroe* and its progeny properly teaches us that § 1983 was designed by Congress to protect federal rights and the failure to provide the protection of federal rights by state officials neglectful and otherwise.

Several courts on the circuit level subsequent to *Monroe* v. *Pape* have accepted various forms of "negligence" or unintentional conduct under § 1983. For example, see *Hoitt* v. *Vitek,* 497 F.2d 598, 602 n.[4] (1st Cir. 1974); *Howell* v. *Cataldi,* 464 F.2d 272, 279 (3d Cir. 1972); *McCray* v. *Maryland,* 456 F.2d 1, 5-6 (4th Cir. 1972); *Jenkins* v. *Averett,* 424 F.2d 1228, 1232-1233 (4th Cir. 1970); *Parker* v. *McKeithen,* 488 F.2d 553, 556 (5th Cir. 1974) cert. denied, 419 U.S. 838 (1974); *Roberts* v. *Williams,* 456 F.2d 819 (5th Cir. 1971), cert. denied, 404 U.S. 866 (1971); *Whirl* v. *Kern,* 407 F.2d 781, 787-789 (5th Cir. 1969) cert. denied, 396 U.S. 901 (1969); *Fitzke* v. *Shappell,* 468 F.2d 1072, 1077 (6th Cir. 1972); *Puckett* v. *Cox,* 456 F.2d 233, 234-235 (6th Cir. 1972); *Spence* v. *Staras,* 507 F.2d 554, 557 (7th Cir. 1974); *Byrd* v. *Brishke,* 466 F.2d 6, 10-11 (7th Cir. 1972); *Joseph* v. *Rowlen,* 402 F.2d 367, 369-370 (7th Cir. 1968); *Dewell* v. *Larson,* 489 F.2d 877, 881-882 (10th Cir. 1974); *Daniels* v. *Van De Venter,* 382 F.2d 29, 31 (10th Cir. 1967); *Stringer* v. *Dilger,* 313 F.2d 536, 540-541 (10th Cir. 1963); *Carter* v. *Carlson,* 447 F.2d 358, 365 (D.C. Cir. 1971), reversed on other grounds, 409 U.S. 418 (1973); *Bryan* v. *Jones,*

530 F.2d 1210 (5th Cir 1976) (en banc) cert. denied 429 U.S. 865 (1976). It should be noted that some of the above "negligence" cases received tacit approval because certioraris denied by the Supreme Court. The Supreme Court's opinions since *Monroe* v. *Pape* do not engraft a state of mind requirement on to claims under § 1983. While *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), and *Wood* v. *Strickland*, 420 U.S. 308 (1975) do set qualifying mental states in relation to defenses or immunities, these requirements possess common ground with the law of negligence and were drawn from it and do not require that plaintiffs in § 1983 claims need to show intent on the part of the defendants. The apparent thrust of *Pierson, Scheuer* and *Wood* is that negligence standards apply in § 1983 cases and that a state official has a duty to not take unreasonable risks when dealing with the constitutional rights of citizens and state officers are required to be aware of the Constitution and not make unreasonable assumptions about their conduct in relation to the Constitution. Despite what the opinion seems to indicate, respondent submits that *Estelle* v. *Gamble*, 97 S. Ct 285 (1976) is actually a case that stands for the proposition that § 1983 liability is established where a series of negligent acts or a pattern of negligent conduct is plead and proven because such a pattern of conduct would properly lead to a finding that the official responsible evidenced "deliberate indifference" or in fact, had acted with negligence. In essence the federal courts are required to step in § 1983 suits

when constitutional rights are infringed whether they be done negligently or intentionally. The constitutional rights of citizens are no less deprived if the deprivations were accomplished through negligence rather than through intentional acts.

Lower federal courts have, as indicated above, recognized negligence claims and nonintentional acts but they have done so cautiously and have required that a real constitutional issue be involved. A good example of this is *Roberts* v. *Williams, supra*, where the fifth Circuit held that a supervisor could be held to account for the "failure to train and supervise" a trustee who negligently shotgunned the plaintiff, but in *Bonner* v. *Conghlin*, 545 F.2d 565 (7th Cir. 1976) (en banc) the court held that a negligent loss of a trial transcript by prison guards leaving the door open to the prisoner's cell was not actionable. *Roberts* v. *Williams, supra*, involved a substantial constitutional right but *Bonner* v. *Conghlin, supra*, did not. *Bonner* involved no due process violation but *Roberts* did. If a police officer runs a red light and injures a citizen, no constitutional right is involved; but if a jailer negligently or nonintentionally imprisons the wrong man, respondent submits that is actionable under § 1983 because it is an affront to the Constitution.

Another modifier on the nonintentional or negligence claim under § 1983 is the nature of the claim itself. In *Estelle* v. *Gamble, supra*, the Supreme Court focused on the nature of the constitutional provision

involved. The way the 8th Amendment is expressed requires more than mere negligence but a series of acts which result in "deliberate indifference." Respondent does believe that the framers of the Constitution regarded a man's liberty and the protection of his liberty as paramount under the Constitution and respondent believes the authors of § 1983 envisioned that a claim such as that of the respondent's is actionable under § 1983, whether it involves negligence or not.

Briefly stated, respondent does not believe that the petitioner has made a good case for rejecting § 1983 suits because of nonintentional acts or negligence. Not even the flood of potential new litigation argument is valid in light of the lower court's careful scrutiny of "negligence" claims under § 1983. This scrutiny coupled with limitations placed on § 1983 as indicated above by *Estelle* v. *Gamble, supra*, have not opened the door to "auto collision" type cases being brought under § 1983. To allow negligence actions under § 1983 does not in any way alter the other requirements for maintaining § 1983 claims, i.e. the § 1983 plaintiff must still convince the trial court (1) that the wrong was committed under color of state law; (2) that the injury caused deprivation of right, privilege or immunity recognized by the Constitution. These requirements coupled the well established principles of tort law are adequate bridles on the plaintiff's lawsuit under § 1983.

IV.

Sheriff Baker Has The Duty To Supervise His Deputies And Supervise The Jail.

Sheriff Baker has also asserted that because he wasn't personally aware of the respondent's incarceration and because he didn't personally participate in the actions causing respondent's incarceration he shouldn't be held liable or in other words he was under no duty to supervise his deputies or his jail or initiate policies and procedures to insure only the right persons would be incarcerated. Since the sheriff is the head of his department and has the authority to hire and fire his deputies[4] and a Texas Statute[5] places the responsibility for the operation of the jail on his shoulders, it appear obvious that this position is just not tenable. This Court in *Monell* v. *New York Dept. of Social Services,* 436 U.S. 658 concluded that after reviewing the legislative history for § 1983 that the word "persons" in § 1983 encompassed local govern-

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[4] Generally see V.A.T.S. Articles 6865-6877 and Sheriff Constables etc., 52 Tex Jur 2nd 283-373.

[5] See V.A.T.S., Articles 5115-5118. Article 5116 that was in effect on the relevant dates involved herein provides as follows:

> Art. 5116. Sheriff and Jailer
>
> Each sheriff is the keeper of the jail of his county. He shall safely keep therein all prisoners committed thereto by lawful authority, subject to the order of the proper court, and shall be responsible for the safe keeping of such prisoners. The sheriff may appoint a jailer to take charge of the jail, and supply the wants of those therein confined; but in all cases the sheriff shall exercise a supervision and control over the jail.

mental entities. This Court went further and said monetary damages can be recovered from the local government itself when the damages resulted from the implementation of policies and procedures put into effect by the local government. This Court limited recovery however to cases where policies and procedures caused the damages and not just because the tort feasor was employed by the local government. Here if the sheriff had implemented the policy of mailing and/or taking mug shots and fingerprints to cities where persons who were arrested and incarcerated pursuant to warrants from Potter Coutny, the respondent would not be before this Court. Further, had Sheriff Baker enforced and implemented the procedure of comparing photos, etc. in his files against the prisoner as the prisoner was being placed in his jail the respondent's claim would not be as damaged or the sheriff might have avoided liability altogether. The sheriff has complete control over his department and has the power to make the decisions and policies by which his department is operated. Unless he violates some state or federal law no one can interfere with his operation of the department and especially his operation of the jail. A Texas sheriff is elected by the people and is answerable only to them, except through misfeasance is office. His duties are statutorily defined but the internal operation of the sheriff's department and jail are solely in the discretion of the sheriff. Respondent does not believe that *Rizzo* v. *Goode*, 423 U.S. 362 (1976) gives the sheriff any solace either. Respondent suggests the "affirmative

link" between the respondent's incarceration and the misconduct of the sheriff need go no further than the sheriff's failure to institute the policies enumerated several times above which would have effectuated the timely release of the respondent. In addition, the Fifth Circuit case, *Whirl* v. *Krn, supra*, cited many times above gives a thorough and exhaustive treatise on the responsibility of a Texas sheriff in relation to his imprisoned charges.

The circuit courts have on several occasions rendered opinions which placed responsibility on the shoulders of the supervisor for failure to properly or adequately supervise their inferiors. See *Roberts* v. *Williams, supra*. Where the 5th Circuit held a prison official responsible for the failure "to train and supervise" a prison trusty. In *Byrd* v. *Briskke*, 466 F.2d 6 (7th Cir. 1972) the Seventh Circuit reversed a directed verdict for the defendant police officers and the supervisory officers who failed to protect the plaintiff from beatings. Also see *Dewell* v. *Larson*, 489 F.2d 877 (10th Cir. 1974), which is a case not unlike the one at bar. Here the 10th Circuit reversed a dismissal of § 1983 claim against a police chief who allegedly failed to supervise his inferiors in the jail when the chief failed to establish procedures where jail personnel would be apprized of missing persons. The plaintiff alleged that had this procedure been in effect a diabetic missing person would not have been classified as a drunk. *Parker* v. *McKeithen*, 488 F.2d 553 (5th Cir. 1974), cert denied, 419 F.2d 838 (1974) is a case

where a prison warden was said to have failed in his supervision of his subordinates and allowed conditions to exist which made it possible for the § 1983 plaintiff to be injured by another inmate. *Sims* v. *Adams*, 537 F.2d 829 (5th Cir. 1976) and *Bryan* v. *Jones, supra*, are also failure to supervise cases which supports respondent's position.

It is also interesting to note that the Texas Supreme Court in the case *McBeath* v. *Campbell*, (Tex Com App 1929) 12 S.W. 2d 118 held that a Texas sheriff that was sued for false imprisonment who defended on the grounds that he didn't know the plaintiff was in his jail was not a defense. The Texas Commission of Appeals in an opinion approved by the Texas Supreme Court ruled that the sheriff's knowledge of his charge was not a valid defense to false imprisonment because Texas Statutes (V.A.T.S. Art. 5116) make the sheriff the keeper of the jail and "it is his (the sheriff's) duty to know by what authority he is confined therein, and he (the sheriff) cannot close his eyes and fail to make investigation and excuse himself on the lack of knowledge," 12 S.W. 2d at 123. Certainly § 1983 liability cannot be less. See *Whirl* v. *Kern, supra*, and *Bryan* v. *Jones, supra*.

V.

Good Faith Is Not Available As A Defense Under The Facts Presented Here.

Finally, Sheriff Baker asserts that he is entitled to qualified immunity and there should not be liable be-

cause he acted in good faith. This Court in *Pierson* v. *Ray, supra*, said the following:

> . . . but thisholding, which related to requirements of pleading, carried no implications as to which defenses would be available to the police officers, As we went on to say in the main paragraph, § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S., at 187. Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause.
>
> "We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983." *Pierson* v. *Ray, supra*, 386 U.S. at 556.

Since that opinion § 1983 defendants have attempted to extend the good faith immunity doctrine to themselves. However, respondent believes that there is no sound reason in law to extend the immunity doctrine to Sheriff Baker under the facts of this case. As pointed out above, respondent is not complaining about his arrest, rather the respondent's complaint concerns the failure of the sheriff to timely cause his release and concedes to Sheriff Baker an appropriate amount of time to discover the error in identification. If one accepts the respondent's view of the case as a false imprisonment case then *Monroe* v. *Pape, supra*

and *Pierson* v. *Ray, supra*, are not authority to extend the good faith immunity to this case. Both *Monroe* and *Pierson* are false arrest cases and respondent concedes that good faith is available in false arrest situations. But this case involves the intentional tort of false imprisonment and "good faith" is not a defense under tort law for false imprisonment. *Whirl* v. *Kern, supra*, the rationale for giving the good faith defense to false arrest cases is that the police officer making an arrest is usually involved in a stressful situation which calls for discretion, speed, and an on-the-spot evaluation. Therefore, a certain latitude must be given to him so as to avoid unjust results for a honest mistake. Here the facts are much different. Respondent is content to wait until the sheriff had time to get the fingerprints and photos to Dallas. There is no pressure to make snap discretionary decisions but merely that the sheriff initiate and enforce policies and procedures to insure only the proper persons are incarcerated. Here the sheriff's duty is clear. He is only authorized to imprison the man actually wanted, not the respondent. The sheriff's duty to timely release is even clearer because his deputies ignored respondent's protests that he wasn't the wanted man.

At this juncture it is necessary to correct a statement that petitioner has made in his application for certiorari and elsewhere to the effect that the respondent has conceded the good faith of the sheriff. *Respondent has not made such a concession.* Respondent will concede there is no evidence in the record that

Sheriff Baker maliciously sought to imprison McCollan, but that is not to say that the respondent concedes that the sheriff intentionally failed to establish a simple procedure for ascertaining the true identify of persons who are arrested pursuant to Potter County arrest warrants. Neither does respondent concede the good faith of the sheriff's office in intentionally ignoring his statements that he was the wrong man.

Even if the petitioner is correct in his position that he is entitled to assert the qualified immunity of good faith; it is clear that that is only a defensive issue. *Pierson* v. *Ray, supra,* and *Bryan* v. *Jones, supra.* This case was taken from jury on an instructed verdict for reasons other than which the case is here before this Court. If the case is sent back for another trial only then will it come into play; good faith has not been established as a matter of law.

Of course if one wishes to view the actions of Sheriff Baker as nonintentional or negligent, then in the opinion of the respondent, good faith is not available as a defense. Judge Swygert of the 7th Circuit clearly indicated that good faith is not defensable in negligence in a dessent in *Bonner* v. *Coughlin, supra*, at page 573, as follows:

> This argument collapses upon examination. Its underlying premise is that good faith is nothing but the absense of bad faith, and since an official can only act in bad faith when he is acting intentionally, a nonintentional act can never be in bad

faith. While it may be true that a nonintentional act cannot be in bad faith, it is *not* true that good faith is simply the absence of bad faith. Good faith requires that "[t]he official himself [is] acting sincerely and with a belief that he is doing right." *Wood*, 420 U.S. at 321. Such as affirmative belief is only possible with respect to intentional acts. It is nonsensical to speak of commiting a negligent act in good faith.

CONCLUSION

For the foregoing good and sufficient reasons the decision of the Court of Appeals to return this matter for a new trial should be affirmed.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-752

T. L. BAKER,

Petitioner,

v.

LINNIE CARL MCCOLLAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INDEX

CITATIONS

Cases

Cases

CONSTITUTION OF THE UNITED STATES

STATUTES

MISCELLANEOUS

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INTRODUCTION AND SUMMARY OF ARGUMENT

The facts giving rise to this case are generally uncontroverted and shall not be restated. The statements of the case by all parties are basically in accord, the differences being the characterization of facts rather than the events or sequence of events giving rise to this action.

The primary thesis of arguments by both Respondent and *Amici* is that the stated cause of action is one for an intentional deprivation of rights and the court should not reach the question of whether negligence can state a § 1983 action. Neither party responds to Petitioner's position that no

§ 1983 action was shown because of a failure to show a deprivation of a recognized Federal right.

Respondent and *Amici* argue that a prima facie § 1983 action for false imprisonment is demonstrated merely by showing an erroneous confinement. The required deprivation to be shown, however, under existing authority, the fourteenth amendment or even general common law is "a confinement without legal authority." This fact was not shown herein and cannot be presumed because there was a valid warrant for arrest which described Respondent. While it may be proper to presume "intent to arrest without legal authority" when no process exists, it is illogical to presume such intent when the confinement is unquestionably supported by valid process.

The most culpable conduct the evidence will support is an unintentional and possibly negligent failure to act. Such conduct, however, should not be the foundation of a § 1983 action. It is unlikely that Congress intended § 1983 to apply to negligent or unintentional acts when the debates preceeding the Act clearly indicated Congress was concerned with overt acts or failures to act accompanied with deliberate intent to cause an injury. Furthermore, the adoption of a negligence standard would encourage litigation but do little to deter undesirable conduct.

The arguments throughout the briefs of Respondent and *Amici* which rely upon state law as a standard for applying § 1983 should likewise be rejected. Respondent brought no pendent state claim and, the Congressional debates accompanying the predecessor statute to § 1983, clearly indicated Congress' purpose was to guarantee to all citizens Constitutional rights. The Act was passed to avoid the effect of state actions, not to enforce them.

I.

Neither Respondent nor the Amici Curiae have demonstated any intentional deprivation of a recognized federal right.

The initial thrust of arguments by both Respondent and *Amici Curiae* is that this case does not raise the issue of whether mere negligence can state a cause of action under § 1983.[1] Petitioner agrees that the court need not reach such issue but for a totally different reason than that asserted by Respondent and *Amici*. The issue need not be reached because there is no evidence that Petitioner Baker, intentionally or negligently, deprived Respondent of a *recognized federal right*.[2]

Both Respondent and *Amici* assume that the slightest interference with a man's freedom states a Constitutional deprivation of rights. The fourteenth amendment, however, does not so provide. Rather, it restrains the deprivation of

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[1] Brief of Respondent, Points I and II, 8-17; Brief of *Amici Curiae*, Points I and II, 11-34. Respondent even takes the strange position that negligence was somehow inserted into the case by Petitioner, (footnote 1 of Brief of Respondent, at 9) though Petitioner has consistently asserted that negligence does not state a § 1983 action.

[2] The supposed actionable conduct was the failure to have used a particular method of identification. The right to be identified only in a particular manner has never before been a recognized federal right and should not support a § 1983 action. *Procunier v. Navarette*, 434 U.S. 555 (1978).

liberty "without due process of law."[3] Nowhere does either Respondent or *Amici* respond to Petitioner's assertion that no violation of due process occurred.

Respondent asserted his claim under 42 U.S.C. § 1983 and the fourteenth amendment to the Constitution.[4] Thus one must assume that Respondent intended to show a deprivation of due process. Respondent's pleadings also support this contention in that Respondent alleged that he was ". . . incarcerated without probable cause and without the authority of a warrant authorizing the arrest. . . ."[5] Neither Respondent or *Amici* develop this point, of course, because the evidence produced at trial dispelled any doubt that the arrest and confinement was effected in reliance upon a valid warrant.[6]

Nor can Respondent and *Amici* cure their dilemma by improperly characterizing the case as an intentional false imprisonment cause cognizable under § 1983 when the confinement is unsupported by any process. Relying primarily on *Bryan v. Jones*[7] and *Whirl v. Kern*,[8] both argue that a *prima facie* case is stated so long as Respondent was, in fact, erroneously confined. Yet, in those cases the deprivation was

[3] U. S. Const. amend. XIV, § 1.

[4] Second Amended Complaint, Appendix (hereinafter "A") 6.

[5] *Id.*

[6] The warrant contained the name Respondent used in this appeal. Plaintiff's Exhibit 7, A 6. The validity or legal correctness of the warrant was never questioned.

[7] 530 F.2d 1210 (5th Cir. 1976) *(en banc), cert. denied,* 429 U.S. 865 (1976).

[8] 407 F.2d 781 (5th Cir. 1969).

the imprisoning "without any legal authority".[9] In both cases the authority for holding the prisoners had been terminated. The authority supporting the arrest and confinement in the instant case was never terminated.

The court in *Whirl v. Kern*[10] carefully distinguished the situation presented in the instant case from the false imprisonment therein. The *Whirl* court said:

> "The case at bar is not, as appellees would have us view it, a case of justifiable reliance upon a warrant of committment valid on its face. Cf. Francis v. Lyman, supra; Peterson v. Lutz, supra. The sheriff relied on nothing and his actions were not informed actions."[11]

In the instant case, the Sheriff and his deputies had relied upon a warrant valid on its face in arresting and holding Respondent. Unlike *Whirl v. Kern*[12] and *Bryan v. Jones*,[13] the warrant was not terminated nor is there any evidence of its invalidity.[14]

Petitioner does not mean to suggest that a police officer may blindly rely upon any warrant regardless of whether

[9] In *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969) the prisoner was held without any process for over nine months and in *Bryan v. Jones*, 530 F.2d 1210 (5th Cir. 1976) the prisoner was held for more than a month without process.

[10] 407 F.2d 781 (5th Cir. 1969).

[11] *Id.* at 791.

[12] 407 F.2d 781 (5th Cir. 1969).

[13] 530 F.2d 1210 (5th Cir. 1976) *(en banc), cert denied,* 429 U.S. 865 (1976).

[14] Under these circumstances the arrest is normally held to have been executed in accordance with due process. *Perry V. Jones,* 506 F.2d 778 (5th Cir. 1975); *Francis v. Lyman,* 216 F.2d 583 (1st Cir. 1954).

it describes the person to be arrested or not. Where, however, the warrant does describe the person to be arrested and he was clearly identified as the person named in the warrant, something more must be shown to suggest a violation of due process.[15] Merely showing that the person should not have been arrested and confined should not be the test if one is to continue the legal fiction that false arrest is an intentional tort.[16] When an officer arrests or confines without the aid of any process, it may be fair to presume that he intended *to arrest or confine without process.*[17] When, however, one arrests and confines pursuant to process, it cannot logically be presumed that he intended *to arrest or confine without process.*[18]

Excepting the "intent" weaved from Respondent's and *Amici's* concocted legal fiction, the record is devoid of any evidence of intentional conduct by Petitioner which deprived

[15] Proof that one knew the process was inaccurate, knew that respondent was not the person sought, or knew facts demonstrating such conclusions and deliberately ignored such facts would appear to be the required minimal proof to characterize the conduct herein as an intentional "arrest without process."

[16] Actual intent, a subjective state of mind, must often be proven circumstantially. Courts have assisted in the proof by creating the legal presumption or sanctioned "legal fiction" that a person "intends" the natural and probable consequences of his actions. See *Monroe v. Pape,* 365 U.S. 167, 187 (1951). This presumption is necessary to uniformly conclude that "false imprisonment" is an intentional tort. To further conclude that an intentional violation of due process was involved, the objective facts should support the conclusion *i.e.* arrest without process.

[17] *Bryan v. Jones,* 530 F.2d 1210 (5th Cir. 1976) *(en banc), cert. denied,* 429 U.S. 865 (1976); *Whirl v. Kern,* 407 F.2d 781 (5th Cir. 1969).

[18] *See Atkins v. Lanning,* 556 F.2d 485 (10th Cir. 1977); *Perry v. Jones,* 506 F.2d 778 (5th Cir. 1975).

Respondent of any federal right. Respondent nevertheless argues that his claim is supported by Sheriff Baker's ". . . intentional failure to investigate and determine that the wrong man was in prison."[19] The error in analysis is the same. Intent is presumed, but not proved. The record is uncontroverted. The only knowing and intentional act Sheriff Baker is shown to have done was to investigate and release Respondent.

The attempts of the *Amici* to construct an intentional deprivation are equally unsupported by the record. *Amici* argue that the Sheriff had a duty to supervise his deputies and that, a failure to adequately supervise his deputies can result in § 1983 liability.[20] Merely stating that Sheriff Baker had a duty to supervise is not proof that Sheriff Baker intentionally or knowingly failed to perform a duty or to properly supervise his deputies. Even *Amici's* lightest standard for determining whether there was a failure to supervise is not shown by the evidence to have been breached. *Amici* state: "It is enough that he failed to intervene to stop or prevent a violation when he had a duty to do so."[21] Yet *Amici* do not suggest any evidence tending to demonstrate a deliberate or even negligent breach of that duty.

Amici argue that a Sheriff who fails to perform a statutory duty can be held liable under § 1983 for that failure.[22] Yet,

[19] Brief For Respondent, at 12.

[20] Brief of *Amici Curiae,* 14-33.

[21] *Id.* at 19.

[22] *Id.,* 20-23.

there is no statute requiring any specific method of identification in executing a warrant.[23] *Amici* then suggest that the duty to supervise can arise from actual knowledge,[24] but *Amici* can point to no evidence in the present case that gives the duty relevant application. Sheriff Baker personally acted to release Respondent the moment he had actual knowledge of his confinement and then acted to lessen the likelihood of a recurrence of the questioned conduct.

Finally, *Amici* suggest that the Sheriff may be held liable in a § 1983 case for failing to supervise his office and to establish procedures to foreclose a reasonably foreseeable occurrence.[25] It should be noted that while *Amici* protest that this is not a negligence case, they set up a classic negligence standard for holding the Sheriff liable.[25] While this negligence argument is closer to the facts of this case, it must nevertheless fail because it is not supported by the evidence

[23] *Amici* compare a California statute discussed in *Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978) requiring specific action with a Texas statute setting out only the general duty to supervise. *Johnson v. Duffy* is also questionable as authority when compared with *Anderson v. Nosser*, 438 F.2d 183 (5th Cir. 1971) mod. and aff'd. 456 F.2d 835 (1972) *cert. denied* 409 U.S. 848 wherein the court held that failure to take before a magistrate did not state a § 1983 action though clearly and specifically required by state statute because it was not a duty encompassed by due process.

[24] Brief of *Amici Curiae*, 26-33.

[25] *Amici* would predicate liability on the "... failure to take elementary precautions that others in the same situation would take ... where his own failure proximately causes a foreseeable deprivation of a federally protected right." Brief of *Amici Curiae* at 27.

and the legal authority is misrepresented.[26] There was no evidence of the Sheriff's "... failure to take elementary precautions ..."[27] to prevent a foreseeable injury. There were identification procedures used to determine that Respondent was the man wanted by the warrant. Respondent was identified by driver's license, date of birth and description. Further, there were additional procedures which were put into effect that did cause the release of Respondent. That the procedures may not have worked as rapidly as other proposed procedures might have, does not demonstrate the affirmative and intentional lack of supervision needed to convert inaction into intentional nonfeasance. All the evidence demonstrated that the Sheriff was extremely attentive to his duties and acted immediately to correct any deficiencies noted.

[26] *Dewell v. Lawson*, 489 F.2d 877 (10th Cir. 1974) cited by *Amici* is not authoritative and the facts were misstated by *Amici*. There the court was reviewing a dismissal on the pleadings. The court could only review plaintiff's complaint and determine whether, under any facts plaintiff might conceivably prove, a cause of action could be maintained. Though the rationale of the decision seemingly based upon either simple negligence or strict liability in tort is questionable, the court did not suggest that mere evidence of a failure to have a particular procedure would support a cause of action. Presumably plaintiff therein could show that the Chief of Police knew of problems in handling medical care and did not act. *Amici* further distorts the case by creating the following facts not present in the opinion: "The Police Chief was unaware of the particular problem. He did not order the arrest, nor did he know of the search for the missing man." Brief of *Amici Curiae* at 27. Since these facts are not recited in the opinion one must wonder about their accuracy and the manner in which the court considered such unknown facts.

[27] Brief of *Amici Curiae* at 27.

In the instant case, the trial court directed an instructed verdict after hearing all of the evidence.[28] To urge that a fact issue is present herein to support an intentional deprivation, *Amici* should point to evidence demonstrating or tending to show a failure to institute policies to prevent a known or foreseeable injury. Minimally, this should require a showing that existing identification procedures had previously been ineffective.[29] This *Amici* cannot do. All that can be shown is that the Sheriff acted to correct a known problem once it existed. There is no evidence that the procedures in effect were inadequate for known or foreseeable injuries reached by § 1983.

II.

Something more than mere negligence should be required to support a § 1983 action.

The facts of this case amply demonstrate the far reaching effects of holding that any evidence of negligence will support a jury issue in a § 1983 case. Particularly this is true where, as here, the simple negligence is of the passive variety.[30] Nevertheless both Respondent and *Amici* argue for such a standard notwithstanding their position that Respondent did not bring an action based on negligence.

[28] Judgment of United States District Court for the Northern District of Texas, A 15.

[29] In *Rizzo v. Goode*, 423 U.S. 362 (1975) this Court considered relevant whether a "pattern" of misconduct had been demonstrated before moving to the question here presented of whether an "affirmative link" between the policy and misconduct existed.

[30] There was no evidence of prior errors in indentification nor any "pattern" of mistaken arrests or any other event occurring before the arrest and confinement to support an inference of intentional nonfeasance.

It is ironic that *Monroe v. Pape*[31] has become the authority for contending that simple negligence should support a § 1983 action. As developed in Petitioner's brief, no clearer facts could exist than those in *Monroe* demonstrating intentional conduct which violated a series of Constitutional rights.

More ironic still is the use of certain authority cited by the Court in *Monroe* and relied upon by *Amici* and Respondent herein to argue that no intent is necessary to support an action under § 1983. The Court in *Monroe* cited,[32] and *Amici* and Respondent in this case rely upon,[33] Congressman Arthur of Kentucky in determining the intent of Congress in passing § 1983. The irony in the reliance upon Mr. Arthur as a spokesman for the intent of the bill is that Mr. Arthur was vehemently opposed to the act.[34] Furthermore, this Court and other courts have rejected most of Mr. Arthur's statements concerning the "intended" effect of the bill. Expanding somewhat on the quote set forth in *Monroe v. Pape*,[35] to place same in proper context, we find that Mr. Arthur feared the bill would have unusually dramatic effects. Quoting before and after the portion noted by the court in *Monroe v. Pape*,[36] we find that Mr. Arthur said, concerning the bill before Congress:

[31] 365 U.S. 167 (1961).

[32] *Id.* at 174, n.10.

[33] Brief of *Amici Curiae* at 35, Brief For Respondent at 18.

[34] The Court correctly labeled Mr. Arthur's position. *Monroe v. Pape*, 365 U.S. 167, 174 (1961); *Amici* do not note his posture, Brief of *Amici Curiae* at 35; and Respondent includes Mr. Arthur as a supporter of the legislation, Brief for Respondent at 18.

[35] 365 U.S. 167 (1961).

[36] *Id.*

"It overrides the reserved powers of the States. It reaches out and draws within the despotic circle of central power all the domestic, internal, and local institutions and offices of the States, and then asserts over them an arbitrary and paramount control as of the rights, privileges, and immunities secured and protected, in a peculiar sense, by the United States in the citizens thereof. Having done this, having swallowed up the States and their institutions, tribunals, and functions, it leaves them the shadow of what they once were. They are nominally what they should be as of sovereign right. And so long as they remain servile, suppliant, and subservient, the mailed hand of central power is stayed. But if the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, *if the Sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error of judgment*, they are liable, and most certain, at the suit of any knave, plain or colored, under the pretext of the deprivation of his rights, privileges, and immunities as a citizen . . . of the United States, to be summarily stripped of official authority, dragged to the bar of a distant and unfriendly court, and there placed in the pillory of vexatious, expensive, and protracted litigation, and heavy damages and amercements, destructive of health and exhaustive of means, for the benefit of unscrupulous adventurers or venal minions of power."[37] [Emphasis added to show portion quoted in *Monroe v. Pape*.]

If Mr. Arthur is correct in stating the intent of Congress, the Court should not excuse the legislatures that enact laws or the Governor that enforces it or the Judges that render judgments. Is not the legislature of Texas equally at fault

[37] Cong. Globe, 42nd Cong., 1st Sess. at 365.

with the Sheriff for failing to have foreseen this problem and enacted a statute requiring sheriffs to use specified means of identification when executing warrants? Is not the Governor at fault for failing to suggest such a bill? Should Judges be protected by virtual absolute immunity in light of Mr. Arthur's suggestions of Congressional intent?

The debate in Congress concerning the passage of the bill that became § 1983 was lengthy. Perhaps other isolated statements may be found superficially suggesting that Congress intended unintentional conduct to be the basis of a § 1983 suit. Yet, even a cursory review of the Congressional debates will clearly indicate that the men deliberating the passage of this statute were not contemplating the type of action set forth in the instant case. Rather, they were concerned with reports indicating a virtual breakdown of law and order,[38] with crimes by whites against blacks going unpunished,[39] with arrests and detentions of blacks totally

[38] This was the tenor of the message of President Grant to Congress initiating the efforts to pass the civil rights legislation. The message was read into the Congressional Record by Hon. J. R. McCormick of Indiana, Cong. Globe, 42nd Cong., 1st Sess. App. 135.

[39] Representative J.P.C. Shanks of Indiana, a strong proponent of the Act, expressed his concern, in part, as follows:

"The men who once formed the slave power of this country, and who now compose the southern wing of Democratic Party, as they did before the war, and who have so longed controlled the destinies of American Democracy, making the exact opposite of that which its name indicates, and who are the power behind the throne and those southern outrages, are to the Negro as a retreating army that destroys all its property that it cannot take with it to keep from falling into the hands of the enemy. So these men; they were compelled to retreat from the army of liberty, and they now purpose to destroy the Negro whom they cannot longer hold his property, rather than he shall become a political strength with those who set him free." Cong. Globe, 42nd Cong., 1st Sess., App. 142.

devoid of any due process.[40] That these men thought the deprivations with which they were concerned were unintentional or negligent somewhat stretches credulity. Rather, it appears that they were dealing with intentional acts and refusals to act which would be characterized as wanton, deliberate, intentional, possibly as deliberately indifferent or grossly negligent, but certainly not as unintentional or negligent.

The conclusion of *Amici* that Congress "intended to permit . . . liability and damages for negligent conduct is suspect."[41] The support gained from *Monroe v. Pape*[42] and *Pierson v. Ray*[43] can take them no further than the conclusion that one need not have a specific intent to violate a Federal right. Neither opinion indicated that intentional or deliberate conduct causing the deprivation was unnecessary.[44]

[40] The record of debates contains listings of crimies going unpunished and punishments inflicted offered in support of the conclusion that the legal processes were being deliberately abused to inflict punishment upon blacks. See, *e.g.*, Portion of speeches of Congressman J.P.C. Shanks, Cong. Globe, 42nd Cong., 1st Sess., App. 144-149; Congressman W. Williams of Indiana, *Id.* at 165-167; and Senator A. I. Boreman of West Virginia, *Id.* at 224-227.

[41] Brief of *Amici Curiae* at 12.

[42] 365 U.S. 167 (1961).

[43] 386 U.S. 547 (1967).

[44] In *Monroe v. Pape*, 365 U.S. 167 (1961) the conduct was objectively a violation of due process. In *Pierson v. Ray*, 386 U.S. 547 (1967) the Court clearly held that plaintiff must prove an absence of "due process", in that case a lack of probable cause. On remand, the plaintiff's burden was to show that the officers did not rely on the invalid statute but deliberately arrested and confined them for attempting to use the "white only" waiting room. *Id.* at 296. Corresponding proof here would be proof that Sheriff Baker arrested and confined Respondent for reasons other than his belief he was the man named in the warrant.

Amici's conclusion that adopting a negligence standard poses no danger of flooding federal courts with nonessential litigation is also questionable.[45] Professor Friedman, one of counsel for *Amici*, has outlined the tremendous growth of civil rights cases.[46] It is highly probable that the adoption of a reduced standard would further accelerate this growth of litigation. In return, little benefit would be gained. As stated in *Bonner v Coughlin*,[47] "extending Section 1983 to cases of simple negligence would not deter future inadvertence as much as in the case of intentional or reckless conduct."[48]

III.

State standards should not determine federal rights.

One frame of reference from which Respondent and *Amici* address the issues posed by this case is erroneous. The prevailing Texas law pertaining to false imprisonment has no direct application because Respondent asserted no pendent state claim.[49] Indeed, counsel for Respondent expressly dis-

[45] Brief of *Amici Curiae* at 38.

[46] *See* Friedman, *The Good Faith Defense in Constitutional Litigation*, 5 Hofstra L. Rev. 501, 502 (1977) which discusses a 1,614% increase in such litigation between 1960 and 1970. Professor Friedman suggests at 502 the possibility of the increase flowing, in part, from the decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). A holding that unintentional conduct may give rise to § 1983 cases would seemingly have an even more widespread effect.

[47] 545 F.2d 565 (7th Cir. 1976) *(en banc)*.

[48] *Id.* at 568.

[49] Respondent's Second Amended Complaint contained an allegation of fact concerning Texas law but suggested jurisdiction only under Federal statutes. Second Amended Complaint, A 6.

avowed any intent to incorporate a pendent state claim in this action, apparently on the premise that the perceived scope of § 1983 rendered such election unnecessary.[50] Yet Respondent and *Amici* predicate the actionability of this case in large measure upon the statutorily defined supervisory duties of a Texas sheriff and the Texas false imprisonment cases, the tenor of which, as developed *infra*, is misrepresented.

As noted above, the facts of this case fail to state a § 1983 cause of action because there is no recognized Constitutional "right" that an arrest and confinement be the result of identfication procedures which are demonstrably the most efficient.[51] Thus even if a state claim *had* been asserted, such could not have been entertained by the court below in the absence of a colorable § 1983 claim.[52]

The foregoing notwithstanding, it is also clear that current precepts of Texas false imprisonment law, measured against the facts of this case, will avail Respondent nothing. Liability must be founded upon a showing that a sheriff

[50] In a colloquy between the trial court and counsel for Respondent, it was made clear that no pendent claim was brought because counsel believed § 1983 to encompass any state tort relating to imprisonment as well as one violating federal due process. See Reporter's Transcript of Proceedings, 228-229.

[51] The court below premised a fact issue on the failure to use particular identification procedures rather than whether it was unreasonable to have identified Respondent as the person named in the warrant, Opinion below, A 21. The distinction may be subtle but is supported by the Restatement of Torts § 125(a). The privilege granted by the warrant is based upon the reasonable belief of the actor that the person arrested is the person named and not the method used to form the belief.

[52] *Coe v. Bogart*, 519 F.2d 10 (6th Cir. 1975); *Manchester v. Lewis*, 507 F.2d 289 (6th Cir. 1974).

knew or should have known that an incarceration was without legal authority and did nothing.[53] Accordingly, the reliance of *Amici* and *Respondent* upon Texas law is misplaced.

In *Whirl v. Kern*,[54] the court clearly discussed and relied upon the Texas cases because it did not have a pendent state claim before it. As discussed *supra*, the false imprisonment there existed because the imprisonment was based upon no authority whatever. Here one cannot presume that the officers "intended to confine without a warrant" because they clearly "intended to confine pursuant to a warrant." Under Texas law no action could arise until the Sheriff was in a position to act and failed to act.[55]

Amici and Respondent advance a second questionable thesis regarding state law: that liability under § 1983 is necessarily coterminus with state common law and statutory actions indirectly involvng an asserted federal right.[56] This hypothesis is not supported by the intent of Congress, as derived from the Congressional record; nor does the proffered posture fall within the pale of sound public policy. The construction of § 1983 urged by *Amici* and Respondent would make that statute the font of tort law rejected in *Paul v. Davis*[57] where this Court said:

[53] *Workman v. Freeman*, 289 S.W.2d 910 (Tex. 1966); *McBeath v. Campbell*, 12 S.W.2d 118 (Tex. Comm'n App. 1921, holding approved).

[54] 407 F.2d 781 (5th Cir. 19[illegible]) *cert. denied*, 396 U.S. 901 (1969).

[55] *Id.*

[56] Brief of *Amici Curiae*, Point II, 14-33; Brief For Respondent at 14.

[57] 424 U.S. 693 (1976).

> "Respondent . . . has pointed to no specific Constitutional guarantee safeguarding the interest he asserts has been invaded. Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should ex proprio vigore extend to him a right to be free of injury wherever the State may be characterized as the tort feasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[58]

A showing of a deprivation of right in this case should necessarily be predicated upon a lack of "due process" in connection with Respondent's arrest and confinement. Since a warrant for arrest which described Respondent did exist, something more must be shown to indicate a violation of due process. Respondent and *Amici* argue that mere negligence in the handling of administrative procedures which delayed the discovery of the error in arresting Respondent is sufficient to destroy the privilege provided by a valid warrant in the name of Respondent. Such argument rests, in part, upon Respondent's and *Amici's* position that State law holds the Sheriff to such a standard of care.[59]

Notwithstanding the clear intent of Congress to establish and preserve basic Constitutional rights to all citizens, Respondent and *Amici* now suggest that the Federal rights should vary in accordance with state law. They assert that it is fair to hold the Sheriff in Texas to a higher standard than elsewhere simply because the State does so. Yet, if Constitutional due process is to have any meaning whatsoever, it must mean the same thing throughout the nation. The largest portion of Congressional debates centered around the question of whether Congress had any power to override State procedural statutes. Concluding that it did, it passed the Civil Rights legislation with which we are now concerned. If the states may not take away Federal rights it seems that they should not each be able to define them according to the common law peculiar to the particular state.

[58] *Id.* at 701.

[59] *Amici* and Respondent look to state law for the duty which is supposedly breached and to avoid the impact of this Court's rejection of the doctrine of respondeat superior in *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978).

CONCLUSION

For the reasons set forth above and in the Brief For Petitioner filed herein, the decision of the court of appeals should be reversed, affirming the directed verdict granted Petitioner by the district court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-752

T. L. BAKER,

Petitioner,

—v.—

LINNIE CARL MCCOLLAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES FOUNDATION OF TEXAS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Page

Statutes:

Law Review Articles:

Page

Treatises:

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No. 78-752

T. L. BAKER,

Petitioner,

v.

LINNIE CARL McCOLLAN,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For The Fifth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES FOUNDATION OF TEXAS, AMICI CURIAE

INTEREST OF AMICI *

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 200,000 members. The American Civil Liberties Foundation of Texas is the ACLU's Texas state affiliate. Both organizations exist

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* Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

solely for the purpose of protecting the civil rights and liberties of Americans. Since 1920, one of the constant concerns of these organizations has been the need to provide adequate legal mechanisms to protect against, and remedy, violations of constitutionally protected rights. Amici are most concerned about the importance of protecting citizens' civil rights and liberties by imposing sanctions against those state officials who abuse their office or are indifferent to the rights of those they are supposed to serve.

Amici have frequently appeared before this Court in support of the historic role of 42 U.S.C. §1983 in remedying violations of federal civil rights, and in deterring departure from constitutional standards. We submit this brief amici curiae to urge the Court to preserve the role of §1983 in enforcing fidelity to the constitutional obligations of state officials entrusted with public power.

STATEMENT OF THE CASE

In October, 1972, a man carrying a driver's license in the name of "Linnie Carl McCollan" and identifying himself as "Linnie Carl McCollan" was arrested in Amarillo, Potter County, Texas, on a narcotics charge. In fact, the man arrested was Linnie Carl McCollan's older brother, Leonard McCollan, and he bore no physical resemblance to his brother. After Leonard McCollan's arrest, photographs and fingerprints were taken of him, and a set of the photos and fingerprints was routinely filed with the identification section of the Potter County Sheriff's Office.

Leonard McCollan was subsequently released on bail, but was later ordered re-arrested (A. 41). A warrant was issued for his re-arrest on November 3, 1972, but Leonard McCollan was identified in the arrest warrant as "Linnie Carl McCollan," the name on the driver's license.

The real Linnie Carl McCollan, respondent in this action, was stopped for a minor traffic violation in Dallas, Texas on December 26, 1972. A routine warrant check revealed that a "Linnie Carl McCollan" was wanted in Potter County, and respondent was therefore taken to the Dallas Police

Station. Dallas Police asked the Potter County Sheriff's Office to send an officer to collect the man they were holding. Although the photograph and fingerprints of the man sought under the warrant were readily available in the files of the Potter County Sheriff's Office, the Potter County Sheriff's deputy who went to Dallas to pick up the respondent took neither of them with him (A. 44). Since the respondent was not picked up by the Potter County deputy sheriff until four days after the Dallas police had called, the deputy sheriff had ample time to retrieve "Linnie Carl McCollan's" photograph and fingerprints from the Potter County files before he went to Dallas, but he failed to do so. Although Linnie Carl McCollan told both the Dallas Police and the Potter County sheriff's deputy that he was not and could not possibly be the "Linnie Carl McCollan" sought in the warrant because he had not been in Amarillo for two years (A. 99), he was nonetheless taken to the Potter County jail on December 30, 1972.

According to the subsequent testimony of petitioner Baker, the sheriff of Potter County at the time of Linnie Carl McCollan's incarceration, the ordinary policy of the Potter County Sheriff's Office was to have

the people responsible for the jail check with the office's identification section when an arrest was made pursuant to a warrant to ensure that the right person had been arrested (A. 45). In Linnie Carl McCollan's case, however, this routine check was not made for four days, over a long holiday weekend, despite his persistent protests. Although the sheriff personally communicated with and supervised his deputies over the telephone throughout that four day period, he did not come to his office until January 2, 1973. Upon his arrival, Baker checked the identification section file (which had inexplicably not been checked by his subordinates), realized instantly from the photographs contained there that the man in custody was not the man who had been sought, and ordered respondent's immediate release (A. 65).

Respondent sued the Dallas police officer who arrested him, the Dallas police chief, and Sheriff Baker and his surety under 42 U.S.C. §1983, charging that they had "wilfully, knowingly, and negligently" deprived him of numerous constitutional rights through "gross negligence and reckless disregard" (A. 8-9).

The Dallas defendants were dismissed from the suit before trial. At trial, petitioner Baker admitted that his deputies had failed to follow departmental policy on verifying the identities of persons arrested. He also conceded that, in sheriff's offices the size of his, when another department arrests someone pursuant to a locally issued warrant, "the ordinary thing" would have been to take the photographs and fingerprints of the person sought to the arresting police department to make sure that the right person had been arrested (A. 44). Nonetheless, after the close of the evidence by both parties, the trial court granted the defendants' motion for a directed verdict.

The Court of Appeals for the Fifth Circuit reversed and remanded for a new trial. Although it held that the deputies' actions were not attributable to the sheriff, a ruling which is not at issue or disputed here, the court held that "plaintiff was entitled to go to the jury on the basis of Sheriff Baker's own action or inaction." Specifically, the court said

> Sheriff Baker's failure to require his deputies to transmit the identification material described above

> "caused" plaintiff's continued detention. Plaintiff has made out a prima facie case under Bryan [Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976) (en banc), cert. denied 429 U.S. 865 (1976)], and Sheriff Baker can escape liability only if he acted in reasonable good faith....[because] [t]he sheriff himself testified that it was a standard practice in most sheriff's departments the size of his to send...identifying material. (A. 21-22).

In short, based on the evidence presented at trial, the court believed that a jury could have found a duty on the sheriff's part to exercise reasonable care to ensure that his subordinates promptly checked the identification of detainees against reasonably available records, that Sheriff Baker breached that duty, and that he caused respondent to be subjected to a deprivation of liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is our view that, for the three reasons set forth in Point I, the writ of certiorari should be dismissed as improvidently granted.

Should the Court decide to hear this case nonetheless, it is important to understand what this case does not involve. First, this case does not involve the §1983 liability of line officers for their negligent or even purposeful acts. Nor does it involve the vicarious attribution to a supervisor of the acts or delinquencies of his subordinates under any version of respondeat superior. Most important, this case does not require a final determination based upon a completed factual record of whether a supervisor can be held liable in a §1983 case, and does not involve the applicability or scope of any defenses a supervisory official may raise. The question before the Court is what a plaintiff must allege and prove in order to make out a prima facie case under §1983 against a supervisory official which, if not rebutted, is sufficient to go to a jury.

Furthermore, the broad question of what liability standard should be applied

in a §1983 action is not raised by this case. Whether "simple negligence," "gross negligence," or "deliberate indifference," must be proven to impose liability under §1983 is a specific, not a general, question. The answer to that question will necessarily vary with the nature of the right infringed and the circumstances surrounding the infringement. Defining the scope of the offended right and the nature of the supervisor's duty will in each instance effectively define any mental requirement §1983 may require.

The essence of the charge against Sheriff Baker is that his failure to supervise his office deprived the plaintiff of personal liberty.[1/] Donaldson v. O'Connor, 422 U.S. 563 (1975). A deprivation of liberty is precisely the kind of deprivation §1983 was designed to redress. Establishing that the supervisor's breach of his duty caused the plaintiff's harm would, in the absence of a legal defense, result in a finding of liability. Thus, the question presented here is not whether "mere negli-

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1/ Any sheriff should know that liberty is a constitutionally protected right. In addition, since Monroe v. Pape, 365 U.S. 167 (1961), it has been clear that an official need not have the specific intent to violate a constitutional right in order to be held liable under §1983.

gence" will support a cause of action under §1983 in some across-the-board sense. The questions raised here are whether Sheriff Baker owed a duty to prisoners to implement and enforce reasonable supervisory measures to ensure that their detention was constitutional; whether he breached that duty by failing to require his subordinates to check the identification of arrested persons against photographs and fingerprints of the person to be arrested that were on file and readily available in the sheriff's office; and whether it was foreseeable that that failure could result in an incorrect identification and an unconstitutional deprivation of liberty, such as actually occurred in respondent's case. If the answers to those questions are yes, then respondent alleged and proved a cause of action under §1983 sufficient, if believed, and if not rebutted by any affirmative defense the sheriff might have, to warrant liability under §1983.

A R G U M E N T

I. THE PETITION FOR CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

Certiorari was granted on the assumption that this case raised the question whether "simple negligence" states a claim under 42 U.S.C. §1983. See questions presented, Baker v. McCollan, No. 78-752, 47 U.S.L.W. 3430. That is an important question, but it is not raised by the allegations or facts in this case. It should not be decided on this record for three reasons.

First, the complaint alleges that petitioner acted "wilfully, knowingly and negligently" (paragraph 4, emphasis supplied, Appendix at p. 8). The use of the conjunctive indicates that respondent intended to prove more than just negligence. Indeed, the complaint explicitly seeks exemplary damages based on "gross negligence and reckless disregard" (paragraph 7 of the Complaint, Appendix, p. 9).

Furthermore, if the jury were to find "gross negligence" or "reckless disregard," as it might on this record, it would not be

necessary or appropriate for this Court to decide in this case whether liability based on a lesser finding of "mere negligence" would suffice. Thus, in our view, consideration by the Court of the "simple negligence" issue is premature. Cf. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); Rescue Army v. Municipal Court, 331 U.S. 549, 568-69 (1947).

Second, the district judge directed judgment for petitioner "after the close of evidence by both parties" (Appendix, p. 16, emphasis added). Although the circuit court assumed that the district judge directed verdict for petitioner because he believed respondent failed to make out a prima facie case (see Appendix at p. 20-21), it is equally possible that the district judge believed respondent had made out a prima facie case, but believed that petitioner had established a good faith defense as a matter of law. If so, the question of the proof required to make out a prima facie case under §1983 would not be raised by this case.[2/]

2/ Accordingly, in the alternative, if certiorari is not dismissed as improvidently granted, the Court should summarily vacate the decision below and remand for clarification of this point.

Third, as shown infra in Point II.B.1, Texas law imposes strict liability on sheriffs for the acts of their deputies, even if the sheriff has not been negligent in any way. Thus, at least in Texas, it would not be unfair to subject sheriffs to liability even for "simple negligence,"[3/] and it is not necessary or appropriate to decide, in this case, whether simple negligence would be sufficient to state a cause of action under §1983 in a state that does not subject sheriffs to strict liability.

3/ Even a "simple negligence" standard would not require Texas sheriffs to do anything they are not already required to do by Texas law, and would not in any way limit their existing discretion.

II. THE FAILURE OF A SUPERVISORY OFFICIAL TO SUPERVISE HIS SUBORDINATES WHEN HE HAS A DUTY TO DO SO CAN SUPPORT LIABILITY UNDER 42 U.S.C. §1983.

The lower federal courts are in disagreement whether the "simple negligence" of a line officer who inadvertently inflicts an injury upon a citizen can support liability under §1983.[4/] Compare Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976)(en banc) with Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969) and Norton v. McKeon, 444 F. Supp. 384 (E.D.Pa. 1977). But, as shown below, the courts agree unanimously that the failure of a superior to supervise his subordinates is actionable under §1983 where breach of a duty

4/ Calling any of the acts in this case "simple negligence" is misleading. None of the acts committed here was "accidental." The deputies plainly intended to keep respondent locked in a cell throughout the period at issue. The question here is a legal question, not a psychological one, namely the proper standard of care to require of jailers and police officers.

to supervise deprives a citizen of a federally protected right under circumstances making it reasonably foreseeable that the failure to supervise would cause the deprivation.

The proper approach in determining whether supervisory personnel can be held liable under §1983 for failure to supervise their subordinates was outlined in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). The major holding in that case was that a municipality can be sued under §1983 if "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers." Ibid. at 690. But Monell also indicated the legal rules to be applied when an individual supervisor (as opposed to a governing body) is sued.[5/] In footnote 58 of the Monell

5/ Although petitioner attempts to cloud the issue by arguing that the subordinates, and not Sheriff Baker, "were the causes, in fact, of the deprivation" (Pet.Br. at 3), the inquiry in §1983 cases is concerned with proximate cause as defined in tort law, not the layman's concept of "cause in fact." See Monroe v. Pape, 365 U.S. 167, 182 (1961).

opinion, the Court said:

> By our decision in Rizzo v. Goode, 423 U.S. 362 (1976), we would appear to have decided that the mere right to control without any control or direction being exercized and without any failure to supervise is not enough to support §1983 liability. (emphasis added).

This test thus defines the "affirmative link" between the actions of subordinates and their supervisors required by Rizzo v. Goode to establish "causation" for purposes of §1983.6/ The Monell test

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6/ In Rizzo, the Mayor, the City Managing Director, and the Police Commissioner, were sued because of the actions of individual police officers not parties to the action. The lower court found that the only "affirmative link" between the higher officials and the civil rights violations was the failure to change police disciplinary proceedings in response to ad hoc incidents and complaints. Rizzo left open the issue raised by this case - whether failure to supervise where control is ordinarily exercised - can lead to §1983 liability. The principal defendants in Rizzo were not charged with a failure to supervise. Unlike the Sheriff here, there was no proof that they had failed to enforce their own rules, guidelines, or standard practices, or the practices that any reasonable individual would undertake in similar situations. Although "the behavior of the Philadelphia police was [not] different in kind or degree from that (FN continued on next page)

is satisfied if (1) control or direction is exercised by a supervising officer and (2) there is a failure to supervise proximately causing forseeable harm to a federally protected right. If these elements are proven, then failure to supervise can constitute a prima facie case for liability under §1983.

A. Actual Control And Direction

The Monell test requires, first, that the defendant have exercised actual control and direction. This requires something more than the merely theoretical right to control. Obviously, in a large police department like Philadelphia's, the mayor, city manager or even the police commissioner does not direct the line officers in their day-to-day activities. The unknown actions of policemen on the beat whose

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which exists elsewhere," 423 U.S. at 375, the sheriff here is charged with conduct that differs unreasonably from the conduct that ordinarily prevailed in his department, or that prevails in other sheriff's departments of similar size and locality. Whether this is true is a question of fact for a jury, not a question of law for a court.

identities the higher officials never knew (or even should have known) perhaps ought not be laid on the doorstep of the highest city officials. By contrast, the defendant in this action, Sheriff Baker, had direct, physical day-to-day control over the deputy who actually inflicted the injury. And as alleged in the complaint, under Texas law, the Sheriff had a non-delegable duty to supervise his deputies, and was personally responsible for their official acts. V.A.T.S. Art 6869, Art. 6870 and Art. 5116.

B. Failure To Supervise

As the Monell test makes clear, even if the evidence permits a finding of actual control and direction, there can be no §1983 supervisory liability without proof of breach of a duty to supervise. But liability attends breach of that duty regardless of whether the breach involved "doing something" or "doing nothing." Federal courts applying the test have found supervisors liable, for example, when a supervisor, present at the beating of a prisoner, "does nothing" to prevent it. Harris v. Chancelor, 537 F.2d 203 (5th Cir. 1976); Byrd v. Brisbke, 466 F.2d 6

(7th Cir. 1972) As the Ninth Circuit said recently in Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978):

> A person "subjects" another to the deprivation of a constitutional right, within the meaning of Section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made. (emphasis added).

Lower federal courts have consistently held that supervisors can be held liable if they "personally participate" in the act that gave rise to the plaintiff's injury. But such personal participation or involvement does not mean that the supervisor must actually have directed the conduct. It is enough that he failed to intervene to stop or prevent a violation when he had a duty to do so. This duty to act can arise in at least three different ways, described below, and two of them are clearly available to the respondent here as bases for establishing a prima facie case against the petitioner.

1. Failure to perform a statutory duty

If a supervisor is required by law to oversee his subordinates and ensure that they properly obey applicable rules designed to safeguard the federally protected rights of those under their charge, but the supervisor fails to exercise that control, he will be and ought to be held liable under §1983. For example, in Johnson v. Duffy, 588 F. 2d 740 (9th Cir. 1978), the sheriff was required by California law to set up a classification committee to run prison honor camps where an inmate might earn money while serving his time. The classification committee alone had the power to order forfeiture of the inmate's earnings or his transfer to another regular prison if he violated rules. An inmate was accused of violating prison rules by being late to lunch. He was ordered transferred by another official and his earnings were forfeited. However, the order was not made by the classification committee pursuant to the California statutory requirement. The court held that the sheriff who was required to set up the

classification committee and act as its chairman could be held answerable under §1983 for his "omission to act in violation of the duties imposed upon him by statute":

> ...The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury. 588 F.2d at 743-44 (emphasis added).

The Court continued:

> Under the California statutes, together with the regulations promulgated pursuant thereto, Duffy was not only required to appoint the Classification Committee, he was also Chairman of the Committee charged with the responsibility of ordering Johnson's transfer from honor camp to the county jail. Duffy himself did not sign a transfer order on behalf of the Committee, and it is agreed that the Committee never met. Nothing in the record even suggests that Duffy could or did lawfully delegate his duty or the duty of the Classification Committee as a whole to act upon Johnson's transfer. Duffy's omission to act, in violation of the duties imposed upon him by statute and by regulations, thus may subject him to liability under section 1983. (emphasis added)

See also United States ex rel Larkins v. Oswald, 510 F2d 583 (2d Cir. 1975) (prima facie case of unlawful confinement in violation of §1983 made out by proof of breach of statutorily imposed duty of prison superintendent to take reasonable measures to avert unlawful segregative confinement).

Precisely such a statutory duty is involved in this case. Texas law specifically requires that "in all cases the sheriff shall exercise supervision and control over the jail," thus clearly establishing Sheriff Baker's statutory responsibility for the circumstances of respondent's incarceration. V.A.T.S. Art. 5116 (b) (emphasis added). In addition, by establishing a standard of strict liability for Sheriffs for the official acts of their deputies, V.A.T.S. Art. 6870,[7] and by specifying that deputies are, by law, agents of the sheriff rather than merely "employees", V.A.T.S. Art. 6869,[8] Texas

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7/ V.A.T.S. Art. 6870 provides in relevant part, "Sheriffs shall be responsible for the official acts of their deputies..."

8/ V.A.T.S. Art. 6869 provides in relevant part that deputies "shall have power and authority to perform all the acts and duties of their principals."

already subjects its sheriffs to liability on the basis of their supervisory action or inaction in circumstances even less direct and personal than required by Monell.[9] In short, Texas law provides for a cause of action in tort based on a breach of a duty to supervise. Indeed, it goes even further -- by authorizing a direct action against the sheriff for the official acts of his deputies. This establishes a statutory "duty to supervise" of the highest possible order.

9/ The Court has indicated that, where state laws better serve the policies of protecting civil rights, they may be relied on by federal courts in civil rights actions. See Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1968) and 42 U.S.C. § 1988. Thus, the Texas statutes, if applied by the courts below, could end this Court's present inquiry. The Fifth Circuit has adopted the rule that "the question of a sheriff's vicarious liability under Section 1983 for acts of his deputy is controlled by state law," Tuley v. Heyd, 482 F.2d 590, 594 (5th Circ. 1973); Baskin v. Parker, 588 F.2d 965, 968 (5th Cir. 1979).

2. Failure to perform a duty arising from actual knowledge

A second group of cases concerning the duty to supervise is relevant to understanding the nature of a §1983 cause of action for breach of that duty even though the same factual basis is admittedly not presented here. In these cases, the supervisor may have become aware that the actions of his subordinates, over whom he exercises direction and control, have caused or are likely to cause constitutional injuries. If the evidence demonstrates that the supervisor was or should have been alerted to the danger, but nevertheless did nothing to avert it, then he should be held liable under §1983 if the foreseeable injury does in fact take place.

A typical case of this genre is Roberts v. Williams , 456 F.2d 819 (5th Cir. 1972) cert. denied, 404 U.S. 866 (1971). There it was held that a supervisor could be held liable under §1983 for his failure to train and supervise a prison trusty who shot a prisoner. The prison trusty's negligence in the use of a shotgun was the immediate cause of the plaintiff prisoner's injury. However,

the court held that the superintendent of the County Farm, who was responsible for supervising the trusty system, was also properly subject to liability under §1983. The superintendent knew that the trusty he selected had previously been convicted of assault with intent to kill. Based on those facts, the court held that a jury could quite properly find both direction and control and breach of a duty to supervise which foreseeably and proximately caused the prisoner's injury. Similarly, Byrd v. Brishke, supra, involved a civil rights action filed against several Chicago policemen for the beating of the plaintiff, Thomas Byrd, in the backroom of a local tavern. A verdict for the defendants was reversed by the Seventh Circuit. In an opinion by Chief Judge Swygert, the court held that a §1983 suit could be maintained against supervisory officers who, though present, failed to protect the plaintiff. Under these circumstances, the jury could have found a breach of a duty to enforce the laws, preserve the peace, and avert summary punishment.[10]

10/ "We believe it is clear that one who is given the badge of authority of a police officer

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In Sims v. Adams, 537 F.2d 829 (5th Cir. 1976), plaintiff sought damages for injuries caused by a police officer. Liability was predicated on the failure of supervisory defendants, including the Mayor and Chief of Police of Atlanta, to discipline a police officer whom they knew to be prone to violent acts. Citing other cases, such as Roberts v. Williams, supra, and Beverly v. Morris, supra, Judge Gee reversed the lower court's dismissal as to the liability of those supervisory defendants under §1983.

3. Failure to establish reasonably adequate protective procedures.

Finally, a supervisor may also be held liable when he fails to take precautions which he reasonably should have known were required to protect a citizen's rights. There may be no specific statutory

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may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge. That responsibility obviously obtains when the nonfeasor is a supervisory officer to whose direction misfeasor officers are committed." Byrd v. Bushke, supra, 466 F.2d at 11.

duty imposed upon him, and he may not have specific facts before him to alert him to the potential for danger to the citizen. But his failure to take elementary precautions that others in the same situation would take could lead to liability where his own failure proximately causes a foreseeable deprivation of a federally protected right.

In Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974), for example, a case whose facts approximate those here, the plaintiff was a diabetic and disappeared from his home one night. His wife alerted the Oklahoma City Police Department, which issued an all-points bulletin for the plaintiff. In the meantime, he was arrested on a charge of public drunkenness by a police officer who mistook the symptoms of diabetic reaction for drunkenness. He remained in jail for four days in a diabetic coma without medical attention. Because of his lack of insulin, he suffered a stroke and brain damage. The police chief was unaware of the particular problem. He did not order the arrest, nor did he know of the search for the missing man. Nevertheless, the Court of Appeals held he

could be held liable in a §1983 suit for his failure to supervise and establish proper procedures:

> We hold that the Court erred in granting Police Chief Lawson's Motion to Dismiss. On the face of the Amended Complaint, Dewell has alleged that Lawson, as Chief of Police, failed to perform a duty imposed upon him which resulted in the deprivation of Dewell's civil rights, i.e., lack of proper identification and medical care constituting cruel and unusual punishment in light of Dewell's diabetic condition and subsequent brain damage and physical impairment by reason of non-treatment or care during his confinement. On the record before us we cannot hold, as a matter of law, that the Amended Complaint does not state a cause of action under 42 U.S.C.A. §1983. 489 F.2d at 881. (emphasis added).

There, as here, the "lack of proper identification" procedures by the person in charge of the jail led to the violation of federally protected rights. See also Parker v. McKeithen, 488 F.2d 553 (5th Cir. 1974), cert. denied, 419 U.S. 838 (1974). Here, as in Dewell, a jury could find that the supervisory official had a duty to enforce identification procedures which a "reasonable man" in that

role would have undertaken, and that that breach proximately caused an unconstitutional deprivation of liberty.

In yet another case, the police chief of Atlanta was held liable under §1983 for failure to supervise his subordinates. Beverly v. Morris, 470 F.2d 1356 (5th Cir. 1972). The defendant was sued "on the theory that Williams was negligent in failing to train properly the auxiliary officer, [and] to supervise his patrol duties...." The court, in a per curiam opinion, upheld judgment for the plaintiff. The judges emphasized that the case was "not one of vicarious liability founded on the theory of respondeat superior, but is instead a claim founded upon the defendant's own negligence." Beverly v. Morris, supra at 1357.

The District of Columbia circuit took a similar approach in Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971); rev'd on other grounds sub. nom., District of Columbia v. Carter, 409 U.S. 418 (1973). Although this Court chose not to address the issue of liability for failure to supervise subordinates on certiorari, see 409 U.S. at 420 n. 3,

the circuit court had addressed the matter specifically on appeal:

> Even if Captain Prete or Chief Layton is protected by official immunity from suit at common law, they are both subject to suit under §1983 for any negligent breach of duty that may have caused appellant to be subjected to a deprivation of constitutional rights. Indeed, Mr. Justice Frankfurter maintained that §1983 was designed for precisely such a case, i.e., the case in which the State shields a police officer from liability for conduct which would subject a private citizen to liability.... In particular, various supervisory officers have been held subject to suit under §1983 for negligence in supervising their subordinates. 447 F.2d at 365. (emphasis added).

In each of the above cases, the supervisor could be held liable under §1983 because all the elements of that cause of action were properly alleged or moved: the official acted under color of state law, a constitutional or other federal right was violated, and the supervisor proximately caused the violation by his failure to supervise when he had a duty to do so. The "negligence" of the supervisors in those cases is far different from the negligence of line officers, for several reasons.

First, supervisors have much broader responsibility, and their acts or omissions can cause correspondingly broader constitutional injuries. Failure to supervise subordinates properly may inflict damage far more widespread than a single officer could inflict. The failure of a supervisor to act can geometrically increase the rate of occurrence of constitutional injuries.[11/]

Second, it is the responsibility of a supervising official to establish and enforce general rules and regulations for those under his command. It is his job to foresee the implications of those rules for the citizens whom they affect. Since he is required to think and act in these broader terms, he should rightly be held liable if he fails in that responsibility.

Naturally, on the facts of this case, this "reasonable person under the circumstances" test does not merely mean the reasonable-man-on-the-street. The standard

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11/ See L. Friedman, "The Good Faith Defense in Constitutional Litigation," 5 Hofstra L. Rev. 501, 521 (1977).

is more appropriately framed in terms of the reasonable Texas sheriff. And by this standard petitioner Baker's conduct is seriously failing. Not only, as he conceded at trial, did Baker fail to see to it that his deputies followed the "ordinary" procedures for sheriff's offices the size of his; by failing to ensure that his duputies would follow governing local standards regarding the identification of arrested suspects, he also failed to organize his department to minimize the tort liability his deputies' actions would automatically impose upon him under Texas law. See discussion, supra. Texas law thus affects this case in two ways, both of which support the conclusion that Sheriff Baker could be held liable under §1983. First, as mentioned supra, Texas imposes a duty to supervise as a matter of law. In addition, Texas law also serves as evidence of what a reasonable Texas sheriff would do. It is plainly unreasonable for a sheriff to fail to establish reliable identification procedures in a state where, since 1846, sheriffs have been strictly liable for their deputies' acts. Mistaken identity is a common law enforce-

ment problem, and a Texas sheriff should be expected to take reasonable steps to avert it - and to do so before, not after, an innocent citizen has been deprived of his liberty for four days.

III. ALTHOUGH IT IS NOT NECESSARY FOR THE COURT TO REACH THIS POINT IN THE PARTICULAR CIRCUMSTANCES OF THIS CASE, SUBJECTING PETITIONER TO PRIMA FACIE LIABILITY UNDER §1983 BASED ON PROOF OF NEGLIGENCE WOULD BE CONSISTENT WITH THE TEXT AND LEGISLATIVE HISTORY OF §1983 AND WITH THE PRIOR DECISIONS OF THIS COURT.

A. Congress Did Not Intend to Incorporate Into §1983 Any Mens Rea Standard Higher Than Ordinary Negligence.

The language of 42 U.S.C. §1983 contains no explicit culpability standard, and does not expressly require proof of more than negligence. The legislative history of §1983 demonstrates that Congress intended to hold officials liable for negligent conduct as well as for reckless and intentional actions.

In its analysis of the legislative history of §1983 in Monroe v. Pape, supra, this Court found no intention by the enacting Congress to limit the reach of the civil remedies created by §1983 to intentional conduct. In reviewing the Congressional debates preceding passage of §1 of the Klu Klux Klan Act, the direct ancestor of §1983, this Court found the sense of Congress illustrated by Mr. Lowe of Kansas

who said "[w]hile murder is stalking abroad in disguise...the local administrations have been found inadequate or unwilling to apply the proper corrective," (emphasis added), Monroe, 365 U.S. at 175-76. To a similar effect is the comment in Monroe, 365 U.S. at 174, n. 10, that:

> The speaker, Mr. Arthur of Kentucky, had no doubts as to the scope of §1; "[I]f the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error in judgment [he is liable]..." (emphasis in original).

This Court also recited a statement during the debates by Mr. Borchard of Illinois as likewise recognizing the broad reach of the Act to situations in which "secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without proper effort to discover, detect, and punish the violations of law and order." Id. at 177 (emphasis added).

This congressional mood in enacting Act is summarized in Monroe:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in

> federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. (emphasis added).

It is thus evident from the legislative history reviewed in Monroe that Congress intended to permit injunctive relief and liability in damages for negligent conduct as well as for reckless and intentional conduct.[12/]

12/ It is noteworthy that even the dissenting opinion by Justice Frankfurter in Monroe, 365 U.S. at 202-259, agreed that conduct actionable under §1983 should not be limited to actions infused by more culpable mental states. Observing that the specific intent requirement established in Screws v. United States, 325 U.S. 91 (1944), was largely a fiction diluted "in practice to mean no more than intent without justification to bring about the circumstances which infringe. . . rights," Justice Frankfurther concluded:

> If the courts are to enforce [§1983], it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation... Petitioner's allegations that respondents in fact did the acts which constituted violations

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B. The Appropriate Standard of Care Under §1983 Should be Determined in Each Case by the Nature of the Right Infringed and the Circumstances Surrounding Its Infringement.

Although it is clear that §1983 was not enacted to create a general federal tort law, Paul v. Davis, 424 U.S. 693 (1976), this Court has nonetheless repeatedly held that §1983 "should be read against the background of tort liability that makes a man responsible for... his actions." Monroe v. Pape, 365 U.S. at 182. See also Pierson v. Ray, 386 U.S. 547, 556-7 (1967). Under

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> of constitutional rights are sufficient." Monroe, 365 U.S. at 207-208.

Incorporation of any general standard higher than ordinary negligence which would prevent courts from ordering injunctive or declaratory relief in §1983 cases would clearly violate congressional intent. Perhaps, for this reason, the court has created defenses to damage actions based on innocent mental states, without making such mental states relevant to the granting of injunctive relief. Accordingly, even if the Court were to rule that negligence would not state a cause of action for damages in §1983, it should not rule that negligence will not state a cause of action in cases seeking declaratory and injunctive relief.

ordinary tort law, a plaintiff cannot succeed unless there is a foreseeable risk of injury to him as a result of defendant's breach of a duty he owes the plaintiff.[13/] To support a course of action under §1983, that risk must be to a constitutional right foreseeably affected by the defendant's action or inaction, and the duty must stem from the defendant's status as an official acting under color of state law. A careful reading of §1983 "against the background of tort liability" leads to two conclusions: (1) no across-the-board standard of care requirement can sensibly be imposed upon the numerous civil rights §1983 is designed to protect, and (2) there is no danger that holding negligence to be a sufficient standard in this case will flood the federal courts with nonessential litigation.

13/ Prosser has written: "In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences, sufficiently great to lead a reasonable man in his position to anticipate them, and to guard against them." Prosser, Hornbook on Torts, (4th ed. 1971) (hereafter "Prosser on Torts"), at 145.

1. No across-the-board standard can sensibly be imposed on all actions brought under §1983.

In developing the doctrine of qualified immunity and the good faith defense, this Court has consistently measured a defendant's actions against the standard of reasonableness. See Wood v. Strickland, 420 U.S. 308 (1975); Procunier v. Navarette, 434 U.S. 555 (1978); Pierson v. Ray, supra. But those doctrines make no sense unless negligence is indeed a standard for liability, at least so far as certain constitutional torts cognizable under §1983 are concerned. For those defendants as to whom plaintiffs make out a case of malicious violation, or reckless disregard, or gross neglect of constitutional rights, the good faith defense will by definition be unavailing because those defendants will be unable to satisfy either the subjective or the objective element of the good faith defense.[14/]

14/ In the leading exposition of the good faith defense, this Court held that a school board member "is immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious inten-

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The only officials who could be absolved from liability by the good faith defense are those against whom plaintiffs have made out no more than a case of negligence. If plaintiff has proven malice, he has disproven subjective good faith; if he has proven gross or reckless disregard, he has disproven objective reasonableness. But if only negligence has been proven against an official, a good faith defense may relieve him from liability.

This is not to say that negligence would be a proper standard for liability for deprivation of all constitutional rights. Some constitutional rights are defined in terms of a particular mental component. For example, the Eighth Amendment's protection against "cruel and unusual" punishment implies by its terms that a certain mental state is a prerequisite to its violation. Consequently, in Estelle v. Gamble, 429 U.S. 97 (1976), the "infliction of unnecessary suffering" upon prisoners by

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tion to cause a deprivation of constitutional rights or other injury to the student." Wood v. Strickland, 420 U.S. at 322. Only if the official had a subjective good faith belief in the reasonableness of his actions, and if that belief was reasonable, will the defense prevail.

denial of medical care was held to amount to a violation of the Eighth Amendment, cognizable under §1983, only where such pain was inflicted through "deliberate indifference" to serious medical needs of prisoners. 429 U.S. at 104. But the text of the Fourth Amendment establishes a right to be free from unreasonable searches and seizures, not just from malicious or reckless ones. Consequently, this Court has held that in a §1983 action alleging illegal arrest, a plaintiff can get his case to a jury by simply showing that the official's conduct was objectively unreasonable, and not legally excused. See Monroe v. Pape, supra, and Pierson v. Ray, supra. Respondent's injury here clearly involves the values of personal autonomy

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15/ This court noted:

> ...a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a claim under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. 429 U.S. at 106.

and freedom from government intrusion protected by the Fourth Amendment.16/ If there is any conclusion to be drawn from the text of the Constitution regarding the standard of care implicit in §1983 actions, it is that the Eighth Amendment is peculiar and unique. Just as the text and legislative history of §1983 fail to support the conclusion that "negligence" should be categorically rejected as an appropriate standard of care to be imposed on state officers under §1983, so does the text of the Constitution discredit the notion that any one standard of care will suffice.

Since this Court held in Monroe v. Pape that an official need not have a specific intent to violate a citizen's constitutional rights in order to be held liable under §1983, the state and lower federal courts have had to scrutinize each fact situation presented to them to see whether, on the whole, the official had met the duty of care imposed by the Constitution on public officials. These courts have followed the common law in gradually evolving standards of care for the protection of constitutional rights on which both the citizen and the official may rely. In every case, the courts must ask (1) whether an injury was foreseeable to the plaintiff or people in the same class or situation as the plaintiff; (2) whether the possible injury to the plaintiff was one that foreseeably affected his constitutional rights, as opposed to some other personal interest; and (3) whether the constitutional violation at issue required a particular mental component on the part of the state officials involved.

16/ Indeed, this deprivation of liberty was total, and therefore invokes all the rights incorporated into the Fourteenth Amendment, many of which have no mens rea component. See generally Kirkpatrick, "Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement," 46 U. Cinn. L. Rev. 45 (1977).

2. Applying a negligence standard in the circumstances of this case would not flood the courts with nonessential litigation.

In Paul v. Davis, 424 U.S. 693 (1976), this Court expressed its concern that if all injuries inflicted by a state official were deemed constitutional violations, the federal courts would be overwhelmed with cases that ought to be tried as state law torts. However, the Court did not then and should not now react to that concern by holding that negligent violations of civil

rights by state officials can never suffice to state a cause of action under 42 U.S.C. §1983. As illustrated above, there is no support in the text or legislative history of §1983, the Constitution, the prior holdings of this Court, or sound policy for such a holding. Moreover, although a per se rule against "negligence" actions brought under §1983 might seem a convenient means of keeping state court tort actions out of federal courts, the proper application of existing principles of §1983 jurisprudence will necessarily have the same effect.

First, Paul v. Davis itself illustrates how the requirement that the plaintiff be deprived of a federally protected right avoids a wholesale conversion of tort actions into §1983 claims. In Paul, the court inquired whether plaintiff had been deprived of a federally protected right, as §1983 expressly requires, and found that he had not.

Second, as illustrated supra, focussing properly on §1983's requirement that the deprivation take place "under color of state law" will also limit §1983 to its intended purpose, and will exclude from federal jurisdiction those tort cases

that should properly be litigated only in state courts. The fact that the offender is a state official does not automatically establish that his acts are necessarily committed "under color of state law." As the court said in Monroe v. Pape:

> The essential element of this type of §1983 action is abuse of his official position.
> 365 U.S. at 172 (emphasis added).

Finally, careful attention to, and development of, the existing requirement that the risk of injury to a federally protected right be reasonably foreseeable will preclude litigation under §1983 of general state tort law claims, without the necessity of developing a new standard of prima facie liability which would require assessment of a public official's subjective mental state.

C. Rejection of Negligence as a Basis for §1983 Liability in This Case Would be Inconsistent With the Prior Holdings of This Court.

In Pierson v. Ray, 386 U.S. at 556-7, this Court reiterated the principle, first articulated in Monroe v. Pape, supra, that §1983 should be read against the background

of tort liability, and held that part of that background in the case of police officers making an arrest is the defense of good faith and probable cause. Because the defense of good faith and probable cause was available to police officers in common law actions for false arrest, the same defense was held to be available to them in §1983 actions based on false arrest. Just as the court in Pierson looked to common law tort doctrine to determine what defenses should properly be available to police officers in §1983 actions, so it ought now to look to the common law to determine what degree of culpability, if any, is necessary to make out a prima facie case under §1983 based on false imprisonment.

At common law, a plaintiff is not required to prove any degree of unreasonableness concerning the defendant's conduct in order to establish a prima facie case for the common law tort of false imprisonment. Questions concerning the defendant's mental state are left for the defendant to prove. The only elements necessary to state a prima facie case of false inprisonment at common law are: (1) intent to confine, (2) acts resulting in confinement, and (3) consciousness of the victim of con-

finement or resulting harm. Restatement, Second, Torts §35 (1965); Bryan v. Jones, 530 F.2d 1210 (5th Cir.) (en banc), cert. denied 429 U.S. 865 (1975). Thus, at common law, not only was negligence actionable; a prima facie case against a state official could be made out for even non-negligent false imprisonment. To require a plaintiff in a §1983 action arising out of false imprisonment to prove that a defendant acted with a greater degree of culpability than negligence would be an unwarranted deviation from the common law. Worse, it would create the anomalous result that constitutional and other federally protected civil rights receive less legal protection than non-constitutional personal and property interests which are protected by state tort law. Consequently, a proper comparison of this action to the "background of tort liability," as required by this Court, confirms that this respondent needed to establish no more than negligence to make out his prima facie case.

C O N C L U S I O N

For the reasons set forth in Point I, the writ of certiorari should be dismissed as improvidently granted. In the alternative, for the reasons set forth in Points II and III, the judgment below should be affirmed, and the case remanded for a new trial.

Respectfully submitted,

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